Supreme Court U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	2
Jurisdiction	2
Question Presented for Review	3
Constitutional Provision Involved	3
Statement of the Case	3
Facts Material to the Consideration of the Questions Presented	3
Reasons for Allowance of the Writ	5
I. The Eleventh Amendment is an Absolute Bar to an Award of Attorney Fees Against State Officials Sued in Their Official Capacities	5
Conclusion	8
Appendix:	
Opinion of the Seventh Circuit dated January 7, 1976	A-1
Order of the District Court dated January 13, 1975.	A-8
Order of the Seventh Circuit dated June 3, 1975.	A-11
Order of the Seventh Circuit dated February 19, 1976	A-13

TABLE OF AUTHORITIES

Page

Cases

Alyeska Pipeline Service Co. v. The Wilderness Society, et al., 95 S. Ct. 1612 (1975) 6, 7

Bitzer v. Matthews, No. 75-283 7

Bond v. Stanton, Cause No. 73 H 184 3

Bond v. Stanton, 372 F. Supp. 872 (N.D.Ind.1974) ... 4

Edelman v. Jordan, 94 S. Ct. 1347 (1974) 7

Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945) 6

Hall v. Cole, 412 U.S. 1 (1973) 7

Jordan v. Gilligan, 500 F.2d 701 (6th Cir., 1974) 5

F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974) 7

Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 1972) ... 5

Constitutional and Statutory Provisions

Eleventh Amendment to the Constitution of the United States 3, 4, 5, 6, 7

28 U.S.C. § 1254 (l) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1343 (3)..... 4

28 U.S.C. § 1343 (4)..... 4

28 U.S.C. § 2101 (c)..... 2

28 U.S.C. § 2201 4

28 U.S.C. § 2202 4

TABLE OF AUTHORITIES—Continued

Page

Constitutional and Statutory Provisions—Continued

42 U.S.C. § 1396 (a)(4)(B) 4

42 U.S.C. § 1983 4

45 CFR 249.10 (a)(3) 4

Other Authorities

Rule 19(1)(b) of the Rules of the Supreme Court of the United States 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO.

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Wayne A. Stanton, individually and in his capacity as Administrator of the Indiana State Department

of Public Welfare; Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert G. Watson, Jr., James W. Burnett, Jr., individually and in their capacity as members of the State Board of Public Welfare, respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), entered in cause number 75-1459 on January 7, 1976, which affirmed the judgment of the United States District Court for the Northern District of Indiana, Hammond Division (hereafter District Court).

OPINION BELOW

The opinion of the Seventh Circuit issued on January 7, 1976, has not been officially reported. A copy of said opinion has been appended hereto at page A-1. The January 13, 1975, Order of the District Court has not been officially reported, but a copy of said Order is appended hereto at page A-8.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on an important federal-state question in a way in conflict with the United States Courts of Appeals for the Third Circuit, the Fifth Circuit, and the Sixth Circuit.

The decision of the Seventh Circuit was entered on January 7, 1976. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTION PRESENTED FOR REVIEW

1. Whether the Eleventh Amendment to the Constitution of the United States is an absolute bar to an award of attorney fees against officials of the State of Indiana when such an award is made against them in their official capacities.

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

STATEMENT OF THE CASE

This Petition arises from an affirmance by the Seventh Circuit of an Order issued by the District Court in the case of *Bond v. Stanton*, Cause No. 73 H 184, whereby the District Court ordered the Petitioners herein to pay $2,366.00 in attorney fees for Respondents' (Plaintiffs' below) counsel.

Facts Material to the Consideration of the Questions Presented

The original lawsuit was commenced on July 23, 1973 when Plaintiffs filed a complaint in the District Court alleging that Indiana's Early and Periodic Screening, Diagnoses and Treatment (hereafter EPSDT) program was unacceptable under the statutes and regulations of the Congress of the United States, and seeking an injunc-

tion mandating the State to institute an acceptable EPSDT program.

The action by Plaintiffs was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343 (3) and (4), 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 28 U.S.C. § 1331, and was decided on cross motions for Summary Judgment in favor of Plaintiffs. 372 F. Supp. 872 (N.D. Ind., 1974). The District Court held that the State of Indiana through its Welfare Department had not complied with the provision of the Social Security Act, 42 U.S.C. § 1396d (a) (4) (B) as of March 1, 1974. The Court permanently enjoined Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them "from continuing to administer EPSDT in violation of 42 U.S.C. § 1396d (a) (4) (B) and the regulations established thereunder, 45 CFR 249.10(a) (3)," and further, "Defendants are ordered to have a program of Early and Periodic Screening Diagnoses and Treatment (EPSDT) in effect in every county by July 1, 1974."

The decision of the District Court was affirmed by the Seventh Circuit on October 30, 1974, 504 F. 2d 1246. Certiorari was denied on March 17, 1975, 95 S. Ct. 1415 (1975). In the meantime, the District Court, on January 13, 1975, entered its Order granting attorneys' fees to Plaintiffs' attorneys in the amount of $2,366.00, finding that there was a lack of good faith on the part of the Defendants in implementing the EPSDT program, and holding that the Eleventh Amendment did not bar an award of attorneys' fees against state officials. The Seventh Circuit affirmed that Order on January 7, 1976.

In an order dated June 3, 1975, issued upon a request for attorneys' fees by Plaintiffs following the appeal by the Petitioners herein of the case on the merits, the Seventh

Circuit stated that the case was ". . . not an appropriate case for utilization of the 'common benefit' or 'common fund' theory," and further held that there was no evidence that the Defendants were in bad faith in prosecuting an appeal. See Appendix page 11.

On February 19, 1976 the Seventh Circuit denied Plaintiffs' request for attorneys' fees following the appeal by Petitioners of the award of attorneys' fees by the District Court. See Appendix page 12.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Eleventh Amendment is an Absolute Bar to an Award of Attorney Fees Against State Officials Sued in Their Official Capacities.

The issue of the Eleventh Amendment bar to an award of attorney fees against state officials has been decided differently by various Circuit Courts of the United States Court of Appeals. In this case the Seventh Circuit held that the Eleventh Amendment is not a bar, and stated that it considered itself "... bound by the Supreme Court's summary affirmance in *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972)." However, the decision of the Seventh Circuit to follow the summary affirmance of *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala., 1972), is contrary to decisions of the Third, Fifth and Sixth Circuits, including the case of *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir., 1974) cert. denied 95 S. Ct. 1996 (1975) wherein the Sixth Circuit stated at pages 709 and 710:

> "Careful study of the *Edelman* opinion leads us to conclude, as did the Third Circuit, that the Eleventh

> Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states . . . The Amendment bars any award which is 'measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the Defendant state officials.' *Edelman, supra,* 94 S. Ct. at 1358."

See note No. 44 in *Alyeska Pipeline Service Co. v. The Wilderness Society, et al.,* 95 S. Ct. 1612, 1627 (1975), for a listing of the cases decided by the lower courts.

The Respondents would submit that attorney fees are not chargeable against them due to the applicability of the Eleventh Amendment to the Constitution of the United States. The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State."

Any recovery of attorneys fees by the plaintiffs would not come from the named defendants, who are merely nominal parties, but would come from the State Treasury. In fact, the Order of the District Court specifically stated as follows:

> "Therefore, it is hereby ordered that the plaintiffs request for attorney fees is granted and the defendants, Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, in their official capacities are hereby ordered to pay the sum of $2,366.00 to the plaintiffs as attorney fees . . ." Appendix, p. 10.

As this Court said in *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945) at page 464:

> ". . . When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants" (cases omitted).

This statement was cited with approval in the case of *Edelman v. Jordan,* 94 S. Ct. 1347, 1356 (1974) where this Court stated:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. (Citing cases)"

In its Opinion the Seventh Circuit cites three cases for the proposition that a federal court has inherent power to assess attorneys' fees against a losing party who has acted in bad faith. *Alyeska Pipeline Service Co. v. Wilderness Society, supra; F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116 (1974); *Hall v. Cole,* 412 U.S. 1 (1973). None of those three cases involved an award of attorney fees against a state official, and therefore, are not controlling herein.

The issue of whether the Eleventh Amendment bars an award of attorney fees against a state is presently pending before this Court in the case of *Bitzer v. Matthews,* No. 75-283. Unlike *Bitzer,* however, this case involves a finding of a "lack of good faith" against the state officials. While respondents do not concede bad faith in this cause, they would submit that that finding is irrelevant to the issue presented herein, and would urge this Court to hold that the Eleventh Amendment is an absolute bar to any money recovery from a state treasury.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 75-1459

LOUISE BOND, individually and on behalf of her minor children; ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association; SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association; NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

vs.

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare; MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare; JOHN KELLEY, individually and in his capacity as Director of the Lake County Department of Public Welfare,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division
No. CV 73 H 184
ALLEN SHARP, *Judge.*

Argued October 31, 1975—Decided January 7, 1976

Before STEVENS, *Circuit Justice,** TONE, *Circuit Judge,* and HOFFMAN, *Senior District Judge.***

TONE, *Circuit Judge.* This appeal presents the question of whether the eleventh amendment bars the assessment of attorneys' fees against state officials sued in their official capacity under 42 U.S.C. § 1983. We hold that it does not, because we consider ourselves bound by the Supreme Court's summary affirmance in *Sims v. Amos,* 340 F.Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972).

Plaintiffs brought this class action to compel the defendant Indiana officials to comply with an amendment to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396g, which was added in 1967. That amendment, 42 U.S.C. § 1396d(a) (4) (B), required the states to adopt an early and periodic screening, diagnosis, and treatment (EPSDT) program for all Medicaid-eligible children, covering those under six years of age by February 7, 1972, and those under twenty one by July 1, 1973. When the defendant officials failed to meet either deadline, plaintiffs brought this action. The District Court found that defendants had failed to comply with the amendment and ordered them to do so by July 1, 1974, reserving the question of attorneys' fees. 372 F.Supp. 872 (N.D. Ind. 1974). This court affirmed. 504 F.2d 1246 (7th Cir. 1974). Later, in an unpublished order, the District Court assessed attorneys' fees against defendants in their official capacities in the amount of $2,366. The award was based on

* Mr. Justice Stevens participated initially as Circuit Judge, and on and after December 19, 1975 as Circuit Justice.

** Senior District Judge Julius J. Hoffman of the Northern District of Illinois is sitting by designation.

the private attorney general theory, now defunct by reason of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), and on the defendants' bad faith both in failing to comply with the requirements of federal law before the action was commenced and in the course of the litigation. This is an appeal from that order.

A federal court has inherent power to assess attorneys' fees against a losing party who has acted in bad faith. See *Alyeska Pipeline Service Co. v. Wilderness Society, supra,* 421 U.S. at 259; *F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974). The bad faith which is the basis for the award may be in the conduct which necessitated the action or in conduct occurring during the course of the action. *Hall v. Cole,* 412 U.S. 1, 15 (1973).

The District Court's finding of bad faith in this case is amply supported by the evidence. The defendant state officials, disregarding their clear legal duty, were, in the words of the District Court, "more than two years late in even attempting to implement a statewide EPSDT program." It was this conduct which necessitated the present injunctive suit. *Cf. Doe v. Poelker,* 515 F.2d 541, 548 (8th Cir. 1975); *Fairley v. Patterson,* 493 F.2d 598, 606 (5th Cir. 1974). In addition, defendants, after suit was filed, "continually asserted compliance with HEW requirements in the face of documentation to the contrary." Stringent as the standards for establishing bad faith may be, *Satoskar v. Indiana Real Estate Commission,* 517 F.2d 696, 698 (7th Cir. 1975), they were more than satisfied by the facts before us. The award of attorneys' fees was therefore justified unless barred by the Constitution.

As noted by the Supreme Court in *Alyeska, supra,* 421 U.S. at 269 n. 44, and by us in *Satoskar, supra,* 517 F.

2d at 698 n.,[1] the circuits are divided on the question of whether the eleventh amendment prohibits assessment of attorneys' fees against a state or state officers acting in their official capacity. Courts have also differed about whether lower federal courts faced with that question are bound by the Supreme Court's summary affirmance of *Sims v. Amos, supra.*[2] In that case a three-judge court,

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[1] In addition to the cases cited in the footnote in *Alyeska* and *Satoskar* referred to in the text, see *Gates v. Collier*, —— F.2d ——, No. 73-1790 (5th Cir. 1975) and *Newman v. Alabama*, —— F.2d ——, No. 73-2033 (5th Cir. 1975) (both cases remanding issue of attorneys' fees to the district court for reconsideration; *Mathews v. Bitzer*, —— F.2d ——, No. 75-2581 (2d Cir. 1975), *cert. granted*, 44 U.S.L.W. 3354 (Dec. 15, 1975); *cf. Hoitt v. Vitek*, 361 F. Supp. 1238, 1255 (D. N.H. 1973), *aff'd*, 495 F.2d 219 (1st Cir. 1974). For a comprehensive discussion of attorneys' fees and the eleventh amendment see Note, 88 *Harv. L. Rev.* 1875 (1975).

[2] The Ninth Circuit relied on *Sims* in awarding attorneys' fees in *Brandenburger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974). A majority of the Fifth Circuit, sitting in banc, evidently did not view *Sims* as controlling in *Newman v. Alabama, supra*, ——F.2d ——, when they remanded for reconsideration in light of *Alyeska* and *Edelman v. Jordan*, 415 U.S. 651 (1974), but five members of that court, speaking through Judge Gewin, felt bound by *Sims*. See also the companion case of *Gates v. Collier, supra*, —— F.2d ——, in which Judge Tuttle, writing for himself and the five dissenters in *Newman*, endorsed Judge Gewin's *Newman* dissent. In the Sixth Circuit, two panels have not followed *Sims*. *Jordan v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974), vacated for further consideration in light of *Alyeska* (presumably as to the part of the opinion upholding an award against a defendant individually on a private attorney general theory), 421 U.S. 982 (1975). In an intervening decision, *Milburn v. Huecker*, 500 F.2d 1279 (6th Cir. 1974), another panel permitted an award of attorneys' fees in an opinion which denies retroactive welfare benefits on the ground of *Edelman's* interpretation of the eleventh amendment, but, in discussing attorneys' fees, makes no reference to *Edelman* or the amendment although citing *Sims*. *Milburn* was cited in *Taylor* only for another point. 503 F.2d at 904.

after finding malapportionment in the Alabama legislature, 336 F.Supp. 924, awarded attorneys' fees and costs to the plaintiffs, 340 F.Supp. 691. It is not clear from the second opinion of the three-judge court in *Sims*, 340 F.Supp. 691, which dealt with attorneys' fees and costs, whether the defendant state officials asserted their constitutional immunity, although the court did say in a footnote that the state had no power to impart any immunity to its officers "from [an] injunction or from its consequences, including court costs incident thereto." 340 F. Supp. at 694 n. 8. The Supreme Court, however, will consider a claim of immunity under the eleventh amendment even though it was not raised in the trial court. *Edelman v. Jordan, supra*, 415 U.S. at 677-678. And, in their jurisdictional statement filed in the Supreme Court, the *Sims* defendants specifically raised the attorneys' fees issue, 41 U.S.L.W. 3090, and asserted that the award of attorneys' fees against "elected state officials sued in their official capacity . . . was tantamount to the award of a monetary judgment against the State of Alabama in direct violation of the doctrine of sovereign immunity." See *Newman v. Alabama, supra*, ——F.2d at —— (Judge Gewin dissenting). A state's sovereign immunity was historically, see *Hans v. Louisiana*, 134 U.S. 1 (1890), the basis for the line of cases culminating in the present doctrine that the

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Footnote 2 Continued

Judge Edwards dissented in *Taylor*, arguing, *inter alia*, that *Sims* was binding. 503 F.2d 906, 907-908. Finally, the Third Circuit, in *Skehan v. Board of Trustees*, 501 F.2d 31, 42 (3d Cir. 1974), vacated in light of *Alyeska* and *Wood v. Strickland*, 421 U.S. 983 (1975), held that *Edelman* "appears to bar the award of attorneys fees from the state treasury," and in a footnote attributes the Supreme Court's failure to overrule its summary affirmance of *Sims* to inadvertence. See also *Sincock v. Obara*, 320 F.Supp. 1098 (D. Del. 1970) (three-judge court).

eleventh amendment governs suits against a state by its own citizens, even though the literal words of the amendment refer only to suits "by Citizens of another State, or by Citizens or Subjects of any Foreign State." See *Edelman v. Jordan, supra,* 415 U.S. at 663. Compare Mr. Justice Brennan's dissenting remarks in *Yeomans v. Kentucky,* —— U.S. ——, ——, 44 U.S.L.W. 3303, 3304 (1975). Accordingly, it would appear that the *Sims* jurisdictional statement sufficiently raised the question of whether the eleventh amendment barred the attorneys' fees award. There can be no doubt, moreover, that the Court intended to rule on the award of attorneys' fees. The initial publication of its order in the unbound volume of official reports referred only to 336 F.Supp. 924, the decision on the merits, as affirmed. As finally published, however, the order of affirmance included 340 F.Supp. 691, the decision which awarded attorneys' fees and costs. 409 U.S. 942. We believe that the Supreme Court's summary affirmance of the district court's award of attorneys' fees against state officials in their official capacity was a decision on the merits of the immunity issue presented to us in this case.

In *Hicks v. Miranda,* 422 U.S. 332, 344-345 (1975), the Supreme Court set at rest any doubts about whether its summary disposition of a case on the merits is binding on the lower federal courts:

> "[T]he lower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'"

We do not find in *Edelman v. Jordan* evidence of an intention to overrule *Sims* or of a doctrinal development indicating that *Sims* would be decided differently today. *Cf. Hicks*

v. Miranda, supra, 422 U.S. at 344.[3] Mr. Justice Rehnquist observed in *Edelman* that the difference between prohibited and permitted relief "will not in many instances be that between night and day," 415 U.S. at 667. The prescience of that observation is illustrated by the conflicting views of the circuits and of judges within the circuits on the question before us. Finally, the citation of *Sims* without comment in the footnote in *Alyeska* which collects the conflicting cases on the application of the eleventh amendment to attorneys' fees, 421 U.S. at 269, n. 44, does not, in our view, show an intention to repudiate the *Sims* holding. A signal to the lower courts would take, we think, a clearer form than that.

AFFIRMED.

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Clerk of the United States Court of Appeals for the Seventh Circuit

[3] Compare the discussion in the Sixth Circuit's *Jordan v. Gilligan, supra,* 500 F.2d at 707-708, with *Doe v. Hodgson,* 500 F.2d 1206, 1207-1208 (2d Cir. 1974), and Judge Edwards dissent in *Taylor v. Perini, supra,* 503 F.2d at 907.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

LOUISE BOND et al	)	
Plaintiffs	)	
v.	)	No. 73 H 184
	)	
WAYNE STANTON et al	)	
Defendants	)	

ORDER

This Court, in its order of March 22, 1974, *Bond v. Stanton,* 372 F.Supp. 872, 875 (ND Ind. 1974), reserved ruling on the plaintiffs' request for attorney fees "pending the filing of supplemental briefs directed to this issue and an accounting of actual costs." Having considered the extensive briefs of both parties, the Court now finds as follows:

1. That this Court has the equitable power to award attorney fees in cases brought pursuant to 42 U.S.C. § 1983 and that this is a proper case in which to make such an award.

2. Plaintiffs meet the requirements of the "private attorney general" theory for awarding attorney fees in that (a) the rights enforced, i.e. right to the benefit of an effective EPSDT program, flows from a program that was considered to be of great importance and priority by Congress, and (b) the suit furthers the interests of a substantial class of persons in Indiana.

3. Although not necessary for an award of attorney fees, an additional reason for awarding attorney fees in this case is the demonstrated lack of good faith on the

part of the defendants who were more than two years late in even attempting to implement a statewide EPSDT program and continually asserted compliance with HEW requirements in the fact of documentation to the contrary. Evidence to support this finding was also adduced in the hearing held on November 5, 1973 on cross-motions for summary judgment.

4. The Eleventh Amendment to the United States Constitution does not bar an award of attorney fees against the state defendants because such fees fall within the permissible "ancillary effect on the state treasury" as outlined in *Edelman v. Jordan,* 94 S. Ct. 1347, 1358 (1974). County defendants are not protected by the Eleventh Amendment, Id. at 1358 n. 12. See also *Class v. Norton,* 505 F. 2d 123 (2d Cir. 1974).

5. Both the Valparaiso University School of Law Legal Aid Clinic and Project Justice and Equality are proper recipients of an award of attorney fees because neither can in any way be considered a part of federal, state or local government, they generally represent individuals and organizations who would otherwise receive no legal representation, they must expend considerable sums to meet the expenses of litigation and the decision to award fees should not stand on the status of the party awarded fees.

6. In determining the amount of fees to be awarded this Court must consider the following factors:

(a) The attorneys and law students representing the plaintiffs are experienced in this type of litigation and demonstrated a high degree of competency in pursuing this matter on behalf of the plaintiffs and members of the class;

(b) The case was relatively complex and novel in that only one other case involving EPSDT had been decided prior to the filing of this case;

(c) As pointed out by the Seventh Circuit in affirming the decision of this Court, the EPSDT program is of vital importance to the health needs of the low income plaintiffs and members of the class and it has been given priority by the Congress of the United States;

(d) The number of hours spent by the attorneys (118.3 hours) and law students (365 hours) on this case.

Therefore, it is hereby ordered that the plaintiffs request for attorney fees is granted and the defendants, Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, in their official capacities are hereby ordered to pay the sum of $2,366.00 to the plaintiffs as attorney fees. This amount represents compensation at the rate of $20.00 per hour 112.4 attorney hours and $30.00 per hour for the 6 attorney hours in court. It shall be paid directly to the attorneys for the two organizations involved and it will be their responsibility to divide the funds between the organizations. Plaintiffs are also awarded costs pursuant to *Boston Chapter, NAACP, Inc. v. Beecher,* —— F. 2d ——, (1st Cir. 1974), 43 U.S.L.W. 2228, dec. November 8, 1974.

Enter January 13, 1975.

/s/ Allen Sharp

Judge, United States District Court

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 3, 1975.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge

Hon. ROBERT A. SPRECHER, Circuit Judge

WAYNE STANTON, et al., Defendants-Appellants,	)	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 73 H 184 Allen Sharp, *Judge.*
No. 74-1409 vs.	)	
LOUISE BOND, et al., Plaintiffs-Appellees.	)	

ORDER

Pursuant to Rule 39 of the Federal Rules of Appellate Procedure, and after having prevailed on appeal, plaintiffs-appellees have applied to this court for costs and attorneys' fees on appeal.

Alyeska Pipeline Service Co. v. *The Wilderness Society,* 43 U.S.L.W. 4561 (U.S. May 12, 1975), forecloses an award of attorneys' fees on a private attorney general rationale in the absence of statutory authorization as in this case. Additionally, this is not an appropriate case for utilization of the "common benefit" or "common fund" theory. *Townsend* v. *Edelman,* slip op. Nos. 73-1960, 1961 at 11 (7th Cir., June 2, 1975); *Satoskar* v. *Real Estate Commission,* slip op. No. 74-1946 (7th Cir., June 2, 1975). Finally, our

examination of the record on appeal convinces us that the defendants-appellants were not in bad faith in prosecuting this appeal.

The plaintiffs-appellees' request for attorneys' fees on appeal is denied and the Clerk is ordered to award costs to the plaintiffs in the amount of $67.90.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 19, 1976.

Before

Hon. PHILLIP W. TONE, Circuit Judge

LOUISE BOND, ET AL., Plaintiffs-Appellees,	)	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. (CV 73 H 184)
No. 75-1459 vs.	)	
WAYNE A. STANTON, ET AL., Defendants-Appellants.	)	

This matter comes before the court on the "Application For Costs And Attorney Fees" filed herein on January 21, 1976 by counsel for the plaintiffs-appellees, and the "Motion To Deny Payment Of Attorney Fees" filed herein on February 9, 1976 by counsel for the defendant-appellant. On consideration whereof, this Court being fully advised in the premises,

IT IS ORDERED that the aforesaid appplication of the plaintiffs-appellees is hereby DENIED.

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1413

WAYNE A. STANTON, Administrator of the Indiana State Dept. of Public Welfare, et al.,
Petitioners,

vs.

LOUISE BOND, et al.,
Respondents.

BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Subject Index

	Page
Interest of amicus curiae	1
Summary of argument	2
Argument	3
I	
Recovery of attorneys' fees from the state is barred by the Eleventh Amendment	3
II	
An award of attorneys' fees against a state may not be predicated upon the common fund or bad faith exceptions to the American rule prohibiting an award of attorneys' fees	9
Conclusion	11

Table of Authorities Cited

Cases	Pages
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975)	3, 9
Bitzer, et al. v. Matthews, et al., No. 75-283, ... U.S. ....., ... S.Ct. ....., 44 U.S.L.Week 5120, 5123 (June 28, 1976)	6
Class v. Norton, 505 F.2d 123 (2d Cir. 1974)	6
Cohens v. Virginia, 6 Wheat. (19 U.S.) 264 (1821)	8
Edelman v. Jordan, 415 U.S. 651 (1974)	2, 3, 4, 5, 6, 7, 8, 9, 10
Ex parte Young, 209 U.S. 123 (1908)	4, 6
Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927)	7, 8
Fitzpatrick, et al. v. Bitzer, et al., ... U.S. ....., ... S.Ct. ....., 44 U.S.L.Week 5120 (June 28, 1976)	6, 7
Hallmark Clinic v. North Carolina Dept. of Hum. Res., 519 F.2d 1315 (4th Cir. 1975)	5, 6

	Pages
Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974)	6
Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991	5
Murgia v. Commonwealth of Mass. Bd. of Retirement, 386 F.Supp. 179 (D.Mass. 1974), judgment affirmed, 421 U.S. 972	6
Named Ind. Mem., San Antonio Con. Soc. v. Texas Hwy. Dept., 496 F.2d 1017 (5th Cir. 1974), cert. denied, 420 U.S. 926	5
Schuerer v. Rhodes, 416 U.S. 232 (1973)	11
Skehan v. Board of Trustees, 501 F.2d 31 (1974), vacated on other grounds, 421 U.S. 983	5
Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975), remanded on other grounds, 423 U.S. 809	6
Sprague v. Ticonic Bank, 307 U.S. 161 (1939)	8
Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975)	8
Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), vacated on other grounds, 421 U.S. 982	5

Codes

Government Code, Sections 825, et seq.	1

Constitutions

United States Constitution:	
Eleventh Amendment	2, 3, 4, 5, 7, 8, 9, 10, 11
Fourteenth Amendment	6, 10

Rules

Federal Rules of Civil Procedure, Rule 25(d)	10

In the Supreme Court
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Petitioners,

vs.

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Respondents.

BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The State of California employs over 130,000 persons and, under state law, defends any employee or former employee against any claim or action arising out of an act or omission occurring within the scope of his employment. Calif. Gov. Code § 825, *et seq.* Imposition of attorneys' fees, even in a small percentage of cases, will have a direct and significant

impact on the funds and fiscal management of the State of California. Resolution of the Eleventh Amendment issue in relation to a federal court's power to grant attorneys' fees against a state official is, therefore, of significant interest to amicus.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the United States Constitution bars the recovery of attorneys' fees from a state treasury. Those circuits which have held otherwise have misconstrued this Court's opinion in *Edelman v. Jordan,* 415 U.S. 651 (1974). This conclusion cannot be altered by labeling an award of attorneys' fees against the state an "equitable remedy" or a "taxation of costs."

An award of attorneys' fees against the state officials cannot be predicated upon the common fund or bad faith exceptions to the American rule prohibiting the award of attorneys' fees. The common fund theory is inappropriate, because no fund will be available from which to reimburse litigants. The bad faith exception cannot support an award of attorneys' fees against the state official in a suit seeking injunctive relief, as the state is the real party in interest and as any award of attorneys' fees would have a direct impact on the state treasury.

ARGUMENT

After this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240 (1975), attorneys' fees may not be awarded by a federal court to a prevailing party based on a private attorney general theory. In *dicta,* this Court appeared to recognize that attorneys' fees can be awarded from a common fund or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id.* at 257-259. In the instant case, amicus submits that the Eleventh Amendment bars an award of attorneys' fees based on the "bad faith" rationale.

I

RECOVERY OF ATTORNEYS' FEES FROM THE STATE IS BARRED BY THE ELEVENTH AMENDMENT.

The Eleventh Amendment to the United States Constitution, ratified in 1798, and unchanged since, provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

This Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. *Edelman v. Jordan,* 415 U.S. 651, 662-663 (1974). In the instant case, although the State of Indiana was not named the defendant, any monetary

award for attorneys' fees will obviously not be paid out of pocket of the defendants, but will have a direct impact on the funds and fiscal management of the State of Indiana. *See Edelman v. Jordan, supra* at 665.

In *Edelman,* this Court held that retroactive payment of welfare benefits wrongfully withheld by state officials was barred by the Eleventh Amendment. *Id.* at 662-669. In so holding, this Court stated:

> "'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (Citations omitted). *Id.* at 663.

In so ruling, this Court specifically distinguished *Ex parte Young,* 209 U.S. 123 (1908):

> "But the relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment. Such relief is analogous to that awarded by the District Court in the prospective portion of its order under review in this case.
>
> "But the retroactive portion of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite different footing. These funds will obviously not be paid out of the pocket of petitioner Edelman." *Id.* at 664.

This Court also held that labeling an award "equitable restitution" does not evade the Eleventh Amendment bar. *Id.* at 665-666. Further, it was held that the State of Illinois did not waive its Eleventh Amendment protection or consent to be sued because it had participated in a federal AABD program. *Id.* at 671-677.

Amicus submits that the rationale of *Edelman* applies to respondents' request for attorneys' fees. There is no doubt, as in *Edelman,* that petitioners will not be held personally accountable for such award. Despite individual defendants named, an award of attorneys' fees would have a direct impact upon the funds and fiscal management of the State of Indiana. Any award of attorneys' fees against a state official in such circumstances would impose an unconstitutional burden on a state treasury.

Accordingly, it has been held that the *Edelman* decision compels the conclusion that the Eleventh Amendment bars the recovery of attorneys' fees against a state. *Jordon v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991. *Accord, Taylor v. Perini,* 503 F.2d 899, 901, 905 (6th Cir. 1974), *vacated on other grounds* at 421 U.S. 982; *Skehan v. Board of Trustees,* 501 F.2d 31 (1974), *vacated on other grounds* at 421 U.S. 983; *Named Ind. Mem., San Antonio Con. Soc. v. Texas Hwy. Dept.,* 496 F.2d 1017 (5th Cir. 1974), *cert. denied,* 420 U.S. 926; *Hall-*

mark Clinic v. North Carolina Dept. of Hum. Res., 519 F.2d 1315, 1317 (4th Cir. 1975). Significantly, this Court has summarily affirmed a decision of a three-judge district court in the First Circuit which denied an award of attorneys' fees both as a matter of law and discretion. *Murgia v. Commonwealth of Mass. Bd. of Retirement,* 386 F.Supp. 179 (D.Mass. 1974), *judgment affirmed,* 421 U.S. 972.

Amicus recognizes that some circuits have taken the position that an award of attorneys' fees is permissible, on the grounds that such an award has only an "ancillary effect on the state treasury" resulting from compliance with the order of injunctive relief. *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974); *Class v. Norton,* 505 F.2d 123 (2d Cir. 1974); *Souza v. Travisono,* 512 F.2d 1137 (1st Cir. 1975), *remanded on other grounds,* 423 U.S. 809.[1] However, an analysis of *Edelman* does not support the conclusion of these circuits. This Court in *Edelman* did not leave at large what was meant by the phrase "ancillary effect." The phrase comes at the end of a paragraph at 415 U.S. 667-668 in which this Court discusses *Ex parte Young,* 209 U.S. 123 (1908), as well as two of this Court's more recent welfare cases, and notes that the decrees in those cases would have an effect on the

[1]In *Fitzpatrick, et al. v. Bitzer, et al.,* No. 75-251, and *Bitzer, et al. v. Matthews, et al.,* No. 75-283, ___ U.S. ....., ... S.Ct. ....., 44 U.S.L.Week 5120, 5123 (June 28, 1976), this Court held that it need not decide this question, as there was express congressional authority for such an award, which authority was based on the Fourteenth Amendment. In the instant case, there is no congressional authority for the attorneys' fees award, nor could there be under the present Social Security Act. *Id.* at 5122.

states' funds. "But," this Court stated, "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature." 415 U.S. at 667-668. This is the "ancillary effect" that this Court describes as permissible.

In the next paragraph, this Court distinguished the decree it was reviewing from those it had referred to:

> "It requires payment of state funds, not as a necessary consequence of compliance in the future with the substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard." 415 U.S. at 668.

It can hardly be argued that an award of attorneys' fees can be classified as a "necessary consequence of compliance in the future with a substantive federal-question determination. . . ."

The argument has also been made that since an award of attorneys' fees resembles more closely the incidental costs sanctioned by this Court in *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70 (1927), such an award is permitted by the Eleventh Amendment. *See Fitzpatrick v. Bitzer, supra,* ..... U.S. ....., ... S.Ct. ....., 44 U.S.L.Week at 5124 (concurring opinion of Stevens, J.). However, this argument must fail for several reasons. First, an award of attorneys' fees has been regarded by this Court as quite unlike

an award of taxable costs. *Sprague v. Ticonic Bank,* 307 U.S. 161 (1939). This distinction has been followed by circuit courts. *See, e.g., Swanson v. American Consumer Industries, Inc.,* 517 F.2d 555, 559-560 (7th Cir. 1975). Secondly, while it is quite true that in *Fairmont, supra,* this Court held that costs could be taxed against Minnesota, it is noteworthy that in that case there is no mention of the Eleventh Amendment. *Fairmont* involved review of a state court decision affirming a criminal conviction. The Eleventh Amendment was not discussed because it had no possible application. The amendment speaks only to suits "commenced or prosecuted *against* one of the united states. . . ." It does not reach a prosecution commenced by the state itself. A state cannot insulate itself from review of its criminal convictions, when they are attacked on federal constitutional grounds, by arguing that under the Eleventh Amendment this Court has no jurisdiction. This much has been settled since the landmark case of *Cohens v. Virginia,* 6 Wheat. (19 U.S.) 264 (1821). Unlike *Fairmont Creamery,* the *civil* suit in the instant case was commenced *against* Indiana. *Fairmont Creamery* has no application to suits commenced *against* a state.

In any event, any argument that *Fairmont Creamery* supports the imposition of attorneys' fees against the state has been put to rest by this Court in *Edelman v. Jordan, supra.* Labeling attorneys' fees as "costs" is as much an evasion of the Eleventh Amendment as labeling retroactive damages "equitable restitution." *Edelman, supra,* at 665-666.

II

AN AWARD OF ATTORNEYS' FEES AGAINST A STATE MAY NOT BE PREDICATED UPON THE COMMON FUND OR BAD FAITH EXCEPTIONS TO THE AMERICAN RULE PROHIBITING AN AWARD OF ATTORNEYS' FEES.

In *Alyeska Pipe Line Service Company v. Wilderness Society, supra,* 421 U.S. 240, this Court disapproved the "private attorney general" approach as a basis for court-awarded attorneys' fees in public interest litigation unless authorized by statute. However, *dicta* in the opinion appears to recognize the continuing validity of the "common fund" and "bad faith" exceptions to the traditional American rule limiting an award of attorneys' fees. *Id.* at 257-259. Amicus submits that the *dicta* in *Alyeska* has no application in the instant case. The Eleventh Amendment bars any such award against the state.

The common fund theory is inapplicable since any fund in a suit against a state official or state agency would necessarily come from the state treasury. However, since *Edelman, supra,* precludes an award of monetary relief from the state treasury, no fund would be available from which to reimburse litigants.

The "bad faith" exception mentioned in *Alyeska* is also inapplicable. This issue was not discussed in *Alyeska, supra,* as the Court of Appeals deemed it inappropriate to burden the State of Alaska with any part of the award. 421 U.S. at 246. Amicus submits that the Eleventh Amendment bars an award of attorneys' fees when injunctive relief is sought against a state official. In such a case, the purpose of the

action is to remedy a state practice, not to impose a monetary liability against the state for past deprivations of constitutional rights. A state official has both the right and the duty to follow state law. When a state law or procedure is alleged to conflict with a constitutional right and a federal suit is filed, the official, as an officer of the state, defends the state interest and, as an officer of the state, will, if ordered, comply with the court order. In such a case the state is the real party in interest. The official is merely a nominal party.[2] To award attorneys' fees on a bad faith theory and without Congressional authority founded on the Fourteenth Amendment is tantamount to an award of attorneys' fees against the state and is therefore barred by the Eleventh Amendment. Granting attorneys' fees in an injunctive suit against a state official by labeling the conduct "bad faith" is as much an evasion of the Eleventh Amendment bar as labeling a retroactive monetary award against a state "equitable restitution." In both cases the real party in interest, the state, is being ordered by a federal court to hand over state funds to a private party. In both cases, the Eleventh Amendment, as explained in *Edelman,* prohibits such an award.

This is not to say that an individual state official cannnot be held personally responsible for a direct and knowing contempt of a federal court order, or that an individual state official cannot be personally

[2]This fact is recognized in Rule 25(d) of the Federal Rules of Civil Procedure, which allows substitution of officials in suits seeking injunctive relief.

liable for damages in a proper suit in which the plaintiff overcomes the official's qualified executive immunity. See *Schuerer v. Rhodes,* 416 U.S. 232, 238 (1973). However, amicus submits that in a contempt proceeding or a damage suit, unlike his position in a suit seeking injunctive relief, the state official is himself the real party in interest.

Redress for the personal acts of state officials during the pendency of an injunctive suit may not be had under the guise of an award of attorneys' fees. Such redress must be sought only in contempt proceedings or a damage action.

CONCLUSION

Amicus submits that the Eleventh Amendment precludes a court ordered award of attorneys' fees against a state.

Dated, San Francisco, California,
July 14, 1976.

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IN THE SUPREME COURT OF THE UNITED STATES

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TOPICAL INDEX

	Page
INTRODUCTION	1
ARGUMENT	
I. THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 (PUB. L. NO. 94-559) DOES NOT APPLY TO STATES OR STATE OFFICIALS IN ACTIONS BROUGHT PURSUANT TO 42 U.S.C. SECTION 1983.	2
II. ASSUMING PUBLIC LAW NO. 94-559 APPLIES TO A STATE OR STATE OFFICIAL IN AN INJUNCTIVE SUIT BROUGHT UNDER TITLE 42 UNITED STATES CODE SECTION 1893, THE STATUTE SHOULD NOT BE APPLIED RETROACTIVELY.	4
CONCLUSION	6

TABLE OF CASES

Bradley v. School Board of the City of Richmond 416 U.S. 696 (1974)	4
Ex Parte Young 209 U.S. 123 (1968)	3
Fitzpatrick v. Bitzer ___ U.S. ___, 96 S.Ct. 2666 (1976)	2
Monroe v. Pape 365 U.S. 167 (1961)	2
Schuerer v. Rhodes 416 U.S. 232 (1973)	4

STATUTES & AUTHORITIES

Title 20, United States Code § 1617	4
Title 42, United States Code § 1893	2
Title VI, Civil Rights Acts of 1964	4
United States Constitution	
Eleventh Amendment	2
Fourteenth Amendment	2

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SUPPLEMENTAL BRIEF OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTION

In their Supplemental Brief, respondents assert that this Court must apply the provisions of Pub. L. No. 94-559 to this case. Respondents also assert that, in light of the legislative history of the act and this Court's decision in Fitzpatrick v. Bitzer, ___ U.S. ___, 96 S.Ct. 2666 (1976), the Eleventh Amendment defense raised by the state officials must be rejected.

Amicus submits that Pub. L. No. 94-559 is inapplicable to suits brought under section 1983, since the real party in interest, the state, is not a person within the meaning of section 1983, and since the award cannot be levied against the individual state official. Amicus also submits that, even if the statute applies to states, it should not be held to apply retroactively against a state, as such a conclusion would re-

sult in an "ex post facto" modification of the Eleventh Amendment. Finally, the statute cannot, in light of due process and qualified executive immunity, be held to apply retroactively against individual state officials.

ARGUMENT

I

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 (PUB. L. NO. 94-559) DOES NOT APPLY TO STATES OR STATE OFFICIALS IN ACTIONS BROUGHT PURSUANT TO 42 U.S.C. SECTION 1983.

In Fitzpatrick v. Bitzer, supra, this Court held that Congress, in exercising its plenary powers pursuant to section 5 of the Fourteenth Amendment, can authorize a suit against a state and, having done so, can grant a federal court the power to award attorneys' fees against a state. In so holding, the Court indicated that it need not address the question of whether or not the Eleventh Amendment bars a money judgment against a state in the absence of specific legislation.

In the instant case, respondents incorrectly presume that Pub. L. No. 94-559 applies to states. This presumption ignores the fact that there is no "threshold . . . congressional authorization" which allows a section 1983 suit to be brought against a state. Fitzpatrick v. Bitzer, supra, 96 S.Ct. at 2670. On the contrary, it is firmly established that states are not "persons" within the meaning of section 1983. Monroe v. Pape, 365 U.S. 167 (1961).

Consequently, while some Congressmen may have interpreted Pub. L. No. 94-559 to include states, the fact is that the statute contains no express or implied amendment to 42 U.S.C. section 1983 or attempt to legislatively overrule Monroe v. Pape, supra. In fact, the Report of the Senate Committee on the Judiciary, quoted on page 7 of respondent's supplemental brief,

indicates that at least some members of Congress harbored the mistaken notion that Pub. L. No. 94-559 applies to states because "defendants in these cases are often State or local bodies or State or local officials." However, the fact that state officials are often named in section 1983 suits does not alter the holding of this Court in Monroe v. Pape, supra, that states are not "persons" within the meaning of section 1983. In light of Fitzpatrick v. Bitzer, supra, the only valid method by which Congress could impose attorneys' fees against a state is to amend 42 U.S.C. section 1983 and specifically define "person" to include states. An attorneys' fees award would then be available in cases brought pursuant to section 1983 and in which a right protected by the Fourteenth Amendment is in issue. Unless and until Congress passes specific legislation which allows a state to be named a defendant in a suit involving a Fourteenth Amendment right, the Eleventh Amendment protects a state against intrusions into its treasury.

It is also clear that in injunctive suits brought pursuant to 42 U.S.C. section 1983, the state is the real party in interest. In such a case, the purpose of the action is to remedy a state practice, and not to impose a personal liability against a state official, who has both the right and duty to follow and defend state law. When a state law or procedure is alleged to conflict with a constitutional right and a federal suit is filed, the official, as an officer of the state, defends the state's interest and, as an officer of the state, will, if ordered, comply with the court order. In such a case the state is the real party in interest. The official is merely a nominal party, named by the plaintiffs because of this Court's holding in Ex Parte Young, 209 U.S. 123 (1908). To impose personal liability on a state official in such a case would violate the official's executive

immunity afforded him by this Court in Schuerer v. Rhodes, 416 U.S. 232 (1973). The official would be exposed to significant financial liability without the protection of factual allegations asserted in a complaint, a jury determination, and other due process protections afforded an official in a properly plead and proven damage suit. In order to preserve the vitality of the executive immunity and assure that states can secure the services of professional officials who can administer the state's business and make decisions without the constant threat of personal financial ruin, the statute in question cannot be interpreted to apply to state officials named as defendants in 1983 suits seeking injunctive relief.

II

ASSUMING PUBLIC LAW NO. 94-559 APPLIES TO A STATE OR STATE OFFICIAL IN AN INJUNCTIVE SUIT BROUGHT UNDER TITLE 42 UNITED STATES CODE SECTION 1893, THE STATUTE SHOULD NOT BE APPLIED RETROACTIVELY.

Citing Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), and legislature history, respondents assert that Pub. L. No. 94-559 applies to all those cases pending in a trial court or on appeal.

Amicus submits that Bradley is distinguishable from the instant case. In Bradley, this Court dealt with 20 U.S.C. section 1617, which granted authority to a federal court to award a reasonable attorneys' fee against a local educational agency, a state (or any agency thereof) or the United States (or any agency thereof) for violations of Title VI of the Civil Rights Act of 1964, or the Fourteenth Amendment, as they pertain to elementary and secondary education. Because the defendant in the case was a local school board, there is no discussion of a state's Eleventh Amendment protection and the propriety of retroactively applying legislation which would have a direct fiscal

impact on a state's treasury. Consequently, respondents' reliance on Bradley ignores the fact that the State of Indiana, unlike a local school board, is protected by the Eleventh Amendment. While, pursuant to Fitzpatrick v. Bitzer, supra, the Eleventh Amendment can be modified by proper Congressional action, there is no rational basis for allocating to Congress the plenary and nonreviewable power to thwart the Eleventh Amendment retroactively. This is especially true in the instant case, in which (1) there is no specific mention that Pub. L. No. 94-559 applies to a state; (2) a state cannot be joined as a defendant under Monroe v. Pape, supra, and (3) the fiscal consequences are overwhelming.[1/] While the protection afforded the states since 1789 by the Eleventh Amendment may now, in some situations, be altered by Congress, justice demands that the states at least be given notice that significant sums will in the future have to be set aside for attorneys' fees awards.

As to the individual state official named defendant in a section 1983 suit, it is clear that retroactive application of the statute would violate the state official's qualified executive immunity (Argument I, supra) and result in a catastrophic financial injustice against an individual who was unfortunate enough to be the nominal state official named in accordance with the dictates of Ex Parte Young, 209 U.S. 123 (1968). It was just

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1. As mentioned by Senator Helms (Supplemental Brief of Respondents, 7-8), the financial consequences of statute are significant. In California alone there are several pending 42 U.S.C. section 1983 suits which include requests for attorneys' fees that may total in excess of one million dollars.

Amicus notes the anamolous situation created if this statute applies to states. Congress can now apparently authorize the raiding of state treasuries notwithstanding the Eleventh Amendment, while at the same time protecting its own coffers simply by legislative prohibition of most attorneys' awards against the federal government.

such a result which lead this Court to conclude in Bradley v. Richmond School Board, supra, 416 U.S. at 716-721 that a statute will not be applied retroactively when manifest injustice will result.

CONCLUSION

Public Law No. 94-559 does not apply to a state or state official named in an injunctive suit brought pursuant to Title 42 United States Code section 1983. The statute cannot apply to a state, because a state is not a "person" within the meaning of section 1983, and therefore there is no enabling legislation modifying the state's protection under the Eleventh Amendment. The statute cannot apply to an individual state official because the official is a nominal defendant shielded by an executive immunity.

Assuming the statute is applicable to a state or state official, it clearly cannot be held to apply retroactively, since a manifest and unconstitutional injustice would be imposed on state treasuries and/or the individual state officials named as defendants.

Consequently, the Public Law No. 94-559 does not alter the conclusion that the Eleventh Amendment bars the award of attorneys' fees in this case.

DATED: November 22, 1976

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GLORIA F. DeHART
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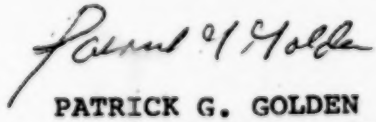

PATRICK G. GOLDEN
Deputy Attorney General

Attorneys for Amicus Curiae
State of California

PGG:md

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

October Term 1975

No. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;

MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;

ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;

SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association;

NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED APRIL 6, 1976
WRIT OF CERTIORARI GRANTED JUNE 1, 1976

Central Publishing Company, Inc., Indianapolis, Ind. 46206

INDEX TO APPENDIX

	Page
Docket Entires—United States District Court for the Northern District of Indiana, Hammond Division; Civil No. 73 H 184	A- 1
The following items are in the Appendix attached to the Petition for Writ of Certiorari.	
Opinion of the Seventh Circuit dated January 7, 1976	A- 1
Order of the District Court dated January 13, 1975	A- 8
Order of the Seventh Circuit dated June 3, 1975	A-11
Order of the Seventh Circuit dated February 19, 1976	A-13

APPENDIX

CIVIL DOCKET

UNITED STATES DISTRICT COURT

LOUISE BOND, individually and on behalf of her minor children; ROSE EDWARDS, as President, NEW DAY WELFARE RIGHTS ORGANIZATION, an unincorporated association; SARAH JUDE, as president, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association; NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare; MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare; JOHN KELLEY, individually and in his capacity as Director of the Lake County Department of Public Welfare,

Defendants.

ATTORNEYS

For plaintiff:

Seymour Moskowitz
Project Justice and Equality
1109 N. Union Street
Gary, Indiana 46402

Lawrence Albrecht
1322 S. 16th Street
Milwaukee, Wisconsin 53204
414-671-6940

Ivan E. Bodensteiner & Wayne Defferding
Valparaiso University School of Law
Valparaiso, Indiana 46383

For defendant:

For deft. John Kelley, Individually and as Director of the Lake County Dept. of Public Welfare:

John P. Segovia
800 Massachusetts Street
Gary, Indiana 46402

For defts: Anna S. Rominger & Norman D. Curry

Deputy Attorney General

Arthur E. Murphy
Donald Bowgard
317-633-5514
219 State House
Indianapolis, Indiana 46204
633-6278

J.S. 5 mailed 8/73

J.S. 6 mailed 4/74
Complaint for Inj. Relief

Basis of Action: T.42,S.1983
Re-medical assistance

Pauper
4/12/74 Aty. Gen. 5.00
(Notice of Appeal)

4/15/74 TREAS. 5.00

Date	PROCEEDINGS
7/23/73	1. Plaintiff files Pauper Affidavit. Order entered thereon granting plaintiff leave to proceed in forma pauperis. (SE) Beamer:J (Order dated 7-19-73 but not received in Clerk's Office until 7-23-73)
7/23/73	2. Complaint filed.
7/23/73	3. Motion for Preliminary Injunction filed. Summons issued and forwarded to U. S. Marshal.
7/30/73	4. Summons returned served on John Kelley on 7/26/73. (5.40)
8/ 3/73	5. Summons returned served on Wayne Stanton, Director on 7/26/73 (4.00)
	6. Summons returned served on Marion M. Hilger on 7/26/73. (4.00)

7. Summons returned served on James W. Burnett, Jr. on 7/26/73. (4.00)

8. Summons returned served on Robert Watson, Jr. on 7/26/73. (4.00)

9. Summons returned served on Arvella M. Stanton 7/26/73. (4.00)

10. Summons returned served on Robert M. Curless on 7/26/73. (4.00)

8/ 9/73 11. John P. Segovia, 800 Massachusetts Street, Gary, Indiana 46402 enters appearance for defendant, John Kelley, individually and as Director of the Lake County Department of Public Welfare.

8/20/73 12. Arthur Murphy, Dept. Atty. Gen. enters his appearance for defts.

13. Defts. file Motion for Enlargement of time, with p.s.

8/22/73 14. Pltfs. file Interrs. to deft. Wayne Stanton with p.s.

8/21/73 15. Order: Defts. have to and including 9-14-73 to file answer. GNB

9/17/73 16. Defendants file Motion for Summary Judgment with Memorandum thereon and certificate of service thereon.

9/25/73 17. Defts. file Answers to pltfs' interrs. and objs. to interrs. with p.s.

10/ 1/73 18. Pltfs. file Motion for Summary Judgment with p,s.

19. Pltfs' file Memo in support of motion for summary judgment with p.s.

10/23/73 20. Court will hear cross-motions for summary judgment on Monday, 11/5/73 at 1:30 p.m.

11/ 5/73 21. Plaintiffs appear by counsel, Seymour Moskowitz, co-counsel Lawrence Albrecht, co-counsel Ivan Bodensteiner and co-counsel Wayne Defferding.

Defendants appear by Arthur E. Murphy, Deputy Attorney General

Defendants motion for summary judgment is presented to the Court.

Arguments heard on deft's motion for summary judgment and also on Plftf's. motion for summary judgment. Matter is taken under advisement and is continued for finding until Feb. 4, 1974.

Each side is ordered to furnish the Court with further evidence or material in support of their respective motions.

11/ 5/73 22. Wayne C. Defferding enters his appearance as Legal Intern for pltfs'/

11/ 8/73 23. Order: The hearing on cross-motions for summary judgment is hereby continued to Feb. 4, 1974, with the parties given the option to file additional and supplemental material under Rule 56. (SE) Allen Sharp, Judge (cpies toJohn P. Segovia, Lawrence Albrecht & Wayne Defferding Seymoour Moskowitz and Arthur E. Murphy)

12/13/73 Court Reporter files Report of Proceedings held Nov. 5, 1973.

(Richard L. Fissinger, Court Reporter)

1/14/74 24. Plaintiffs files Motion for Order to Depose Witnesses with Memorandum in Support thereof with certificate of service thereon.

1/14/74 25. Order entered allowing plaintiffs to depose witness by means of a tape recording device. (SE) Allen Sharp, Judge (copies to counsel)

2/ 1/74 26. Defendants file Affidavit with certificate of service thereon.

2/ 5/74 27. Pltfs. file Motion for Enlargement of time with cer. of ser.

28. Order entered: that an enlargment of time be granted up to and including the 25th day of Feb. 1974 in which to file additional and supplemental material. (SE) Allen Sharp, Judge (copies to: Moskowitz, Albrecht, Segovia and Murphy)

2/27/74 29. Order entered: It is Ordered that the pltf. be given an extension of time until and including March 1, 1974, for the limited purpose of preparing depositions already taken for filing. (SE) Sharp Copies to: Moskowitz, Albrecht, & Defferding, Segovia, and Murphy.

2/25/74 30. Motion for Enlargement of Time filed by Pltfs. with Cert. of Service.

2/25/74 31. Pltfs. file Supplemental Brief in Support of Pltf's. Motion for Summary. Judgment, with cert. of service.

3/ 1/74 Depositions of Wayne A. Stanton, Marion Steffey, John Kelley, Elizabeth Vallance filed.

3/ 5/74 32. Letter to Judge Sharp from Ivan E. Bodensteiner, dated March 4, 1974

3/ 5/74 33. Defendants, Wayne A. Stanton, etc., file Motion to Strike and in the Alternative Motion for Leave to File Reply Brief with certificate of service attached thereto.

3/ 7/74 34. Order entered: Defts. Wayne A. Stanton, Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert G. Watson, Jr., James W. Burnett, Jr., by their counsel, the Attorney General for the State of Indiana, have filed a Motion to Strike andin the alternative, a Motion for leave of court to file reply biref. Thse two motions are DENIED. (SE) Allen Sharp, Judge
Memoandum attached thereon.

(copies to: Moskowitz, Albrecht & Defferding, Segovia and Att. of Ind.)

3/11/74 35. Att. Gen. of Ind. files Defts' Supplemental Response with cer. of ser.

3/22/74 36. *MEMORANDUM OPINION ORDERED ENTERED:* Deft's. motion for summary judgment is DENIED.

Pltf's. motion for summary judgment is GRANTED in part and DENIED in part.

Defts. are ordered to have program of Early and Periodic, Screening, Diagnoses and Treatment in effect in every county in Ind. by 7/1/74. Ruling on pltfs. request for atty. fees will be reserved pending the filing of supplemental briefs. Pltf's. request for compensatory and punitive damages is DENIED.

Pltf's. request to appoint a receiver is DENIED. Pltfs. are denied all other relief at this time. This Order is intended to be a final judgment as to the claims decided. (SE) Sharp, Judge. Copies to counsel.

4/12/74 37. Defendants, Wayne A. Stanton, Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert G. Watson, Jr., James W. Burnette, Jr. and John Kelley, file Notice of Appeal.

4/12/74 38. Clerks certificate of mailing issued. (copies to counsel)

5/ 3/74 39. Defts., Wayne A. Stanton, Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert G. Weston, Jr. and James W. Burnett, Jr., file Petition for Stay of Proceedings with proof of service attached thereto.

5/ 6/74 40. Order entered granting plaintiffs 20 days to respond to defts.' Petition for Stay of Proceedings. (SE) Allen Sharp, Judge (copies to counsel)

5/10/74 41 Plaintiffs file Memorandum Opposing Stay Pending Appeal with certificate of service thereon.

5/17/74 42. Defts. Wayne A. Stanton; Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert G. Watson, Jr. and James W. Burnett, Jr. file Supplemental Petition for Stay of Proceedings.

5/17/74 43. Order entered: The petition for stay of proceedings pending appeal filed May 3, 1974 by defendants Wayne A. Stanton, Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert G. Watson, Jr. and James W. Burnett, Jr. is GRANTED. (SE) Allen Sharp, Judge (copies to counsel)

5/20/74 Record on Appeal forwarded to U. S. Court of Appeals via mail.

6/ 5/74 Plfts. file Motion for Production of Documents, with cer. of ser. thereon.

6/ 5/74 ORDER ENTERED: Defts. are hereby given 20 days from this date to respond to pltf's. motion for production of documents filed June 5, 1974. (SE) Sharp, Judge. Copies to counsel.

6/13/74 Order Entered From Court of Appeals:

That the Motion to vacate the stay shall be and the same is hereby DENIED.

That the Appellant's brief shall be filed on or before July 3, 1974; the Appellee's brief thirty days thereafter; and a reply brief, if any, fourteen days thereafter. No extensions of time will

be granted barring exceptional and unforeseen circumstances. Oral argument in this appeal will be heard during the week of Sept. 9, 1974.

6/28/74 Anna S. Rominger, Deputy Attorney General, 219 State House, Indianapolis, Indiana, enters appearance for defendants, Wayne A. Stanton, Marion Helger, Robert Curless, Arvella Stanton, Robert Watson, Jr. and James W. Burnett, Jr.

6/28/74 Defendant, Wayne A. Stanton, files Motion for Protective Order with Memorandum in Support thereof.

7/17/74 Pltf. files Motion for Order Compelling Discovery with Memo in Support of Motion with cer. of ser.

7/18/74 Anna S. Rominger, Dept. Att. Gen. of Ind. enters her appearance for defts.

7/19/74 Order entered: Pltfs' Motion for an Order Compelling Discovery, filed July 15, 1974 is GRANTED. Deft. Wayne A. Stanton, Admr. of the State Department of Public Welfare, is ordered to produce documents which were requested in Pltfs' Motion to Produce filed on June 5, 1974 within 20 days. Deft's Motion for a Protective Order is DENIED.

Pltfs. will have until Sept. 30, 1974 to file any and all briefs directed to the issue of the award of attorney fees. Deft. will have 30 days from the filing date of pltfs' briefs within which to file a response.. (SE) Allen Sharp, Judge
Memorandum filed thereon.

(copies to: Moskowitz, Albrecht, Bodensteiner, Segovia, and Att. of Gen. of Ind.)

9/16/74 Petitioner Lawrence George Albrecht files Verified Petition to Appear Pro Hoc Vice with cer. of serv. HB

9/17/74 Order entered: Petitioner, Lawrence George Albrecht, is hereby granted leave of court to appear Pro Hac Vice. (SE) Allen Sharp, Judge (copies to: Moskowitz, Albrecht, Bodensteiner & Defferding, Segovia and Att. Gen. of Ind.) HB

10/ 1/74 Plfts. file Memo. of Law in Support of Request for Attorney Fees, with cer. of ser. thereon.

10/31/74 Slip sheet from Court of Appeals received and filed showing decision of this court AFFIRMED.

10/31/74 State of Indiana, Defts. files Motion for Enlargment of time.

10/31/74 Order entered: That Defts. Wayne Stanton et al are given until Nov. 15, 1974 to file their breif in Opposition to Pltfs. Memorandum of Law in Support of Request of Attorney's Fees. (SE) Allen Sharp, Judge (copies to all counsel)

11/20/74 Defts. files Memo in Opposition to Pltf's Request for Atty. Fees. with cer. of ser. thereon.

11/20/74 Defts. file Notice of Request for a Hearing, with cer. of ser. thereon

12/ 3/74 Pltfs' Reply Memorandum Regarding Attorney Fees filed. HB

1/13/75 Order Entered: It is Ordered that the Pltfs. request for Atty. fees is Granted and the Defts., Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, in their official capacities are hereby ordered to pay the sum of $2,366.00 to the pltfs. as atty. fees. It shall be paid directly to the atty.s for the two organizations involved and it will be their responsibility to divide the funds between the organizations. Pltfs. are also awarded costs pursuant to Boston Chapter, NAACP, Inc. v. Beecher, F. 2d, (1st Cir. 1975), 43 U.S.L.W. 2228, dec. Nov. 8, 1974. (SE) Sharp, Judge. Copies to counsel.

1/20/75 Cert. copy of order received from Ct. of Appeals: This matter comes before the Court on the "Pltfs-Appellees' Motion to Vacate Stay and for Immediate Issuance of Mandate" filed herein on Dec. 16, 1974. On consideration whereof,

IT IS ORDERED that said motion be, and the same is hereby, GRANTED.

1/20/75 Received cert. copy of order from Court of Appeals: On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day. HB

FILE TO BE RETURNED AT A LATER DATE.

1/24/75 Pltfs. file Motion for Issuance of Order Mandating Implementation of This Court's March 22, 1974 Declaratory Judgment and Injunction, with cer. of ser. thereon.

1/24/75 Order entered:

(a) Defts. shall submit a proposed plan for implementation of EPSDT to the court within thirty (30) days.

(b) Within ten (10) days of the filing of the defendant's plan, pltf. shall submit written comments and/or objections to defts. and the court.

(c) Within ten (10) days of the filing of plaintiff's comments and/or objections, the parties will meet and attempt to resolve any differences regarding the proposed plan.

(d) Within ten (10) days of such meeting or meetings, counsel for pltfs. will submit a detailed written report to the court summarizing the parties agreements and remaining differences.

(e) Within ten (10) days of such report the parties shall confer in court about any remaining differences. (SE) Allen Sharp, Judge

(copies to counsel)

2/10/75 Pltfs. Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert J. Watson, Jr. and James Burnett file Notice of Appeal.

2/10/75 Clerk's certificate prepared and distributed.

2/19/75 Att. Gen. of Indiana files Motion for Enlargement of time to comply with court order with cer. of ser. HB

2/26/75 Pltfs. file Objection to Defts'. Motion For Enlargement Of Time, with cer. of ser. thereon.

2/24/75 Defts. file Duplicate Motion for Enlargement of Time to Comply With Court Order, with cer. of serv. thereon.

2/26/75 Order Entered: The motion for enlargement of time to comply with the Court Order of Jan. 24, 1975, is Granted as follows:

Deft. Wayne A. Stanton is given an extension of time up to and including March 5, 1975, in which to comply with this court's order of Jan. 24, 1975. (SE) Sharp, Judge. Copies to counsel.

3/ 6/75 Dept. of Public Welfare files their Plan of Implementation of Indiana's Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) program for children of families who are recipients of Assistance to Families with Dependant Children (AFDC). HB

3/14/75 File forwarded to Court of Appeals. (Second part of file).

First part of file never returned from Court of Appeals.

3/17/75 Filed Pltfs' Response to Defts' EPSDT Plan and Request for time for Discovery filed with cer. of ser. HB Order to Judge

3/27/75 Pltfs. file Motion for Production of Documents, with cer. of ser. thereon.

3/24/75 Order entered:

1. Pltfs. are granted leave to and including April 18, 1975, in which to complete discovery regarding the defendants' proposed EPSDT plan
2. Pltfs. are granted leave to take depositions during that time pursuant to the provisions of the earlier Order entered by this Court regarding depositions by tape recording:
3. The defts. are ordered to respond to a timely filed Motion for Production of Documents within ten (10) days after service of the Motion; and
4. Pltfs. are granted leave to and including April 28, 1975, in which to file their written comments and/or objections to the defendants' proposed EPSDT plan. (SE) Allen Sharp, Judge (copies to counsel)

4/ 9/75 Theodore Sendak, Att. Gen. of Ind. files Response to Deft's Motion for Production of Documents with cer. of ser. HB

4/ 9/75 Norman D. Curry, Deputy Att. Gen. enters his appearance for defts. HB

4/29/75 Pltfs. file Comments and Objections Regarding Defts. Proposed EPSDT Plan, with cer. of ser. thereon.

3/19/75 Return receipt received showing that file received at Ct. of Appeals on 3/17/75.

5/ 8/75 Defendants, Indiana State Department of Public Welfare, file Motion for Enlargement of Time.

5/15/75 Order Entered: It is Ordered that the defts., Ind. State Dept. of Public Welfare be allowed

until and including May 23, 1975 to plead and answer in this cause. (SE) Sharp, Judge. Copies to counsel.

6/ 2/75 Defts. file Interrogatories to Pltfs and Purported Class, with cer. of ser. thereon.

6/ 6/75 Certified Copy of Order received from U. S. Court of Appeals:

Pursuant to Rule 39 of the Federal Rules of Appellate Procedure, and after having prevailed on appeal, plaintiffs-appellees have applies to this court for costs and attorneys' fees on appeal. *Alyeska Pipeline Service Co. v. The Wilderness Society,* 43 U.S.L.W. 4561 (U.S. May 12, 1975), forecloses an award of attorneys' fees on a private attorney general rationale in the absence of statutory authorization as in this case. Additionally, this is not an appropriate case for utilization of the "common benefit" or "common fund" theory. *Townsend v. Edelman,* slip op. Nos. 73-1960, 1961 at 11 (7th Cir., June 2, 1975); *Satoskar v. Real Estate Commission,* slip op. No. 74-1946 (7th Cir., June 2, 1975). Finally, our examination of the record on appeal convinces us that the defendants-appellants were not in bad faith in prosecuting this appeal. The plaintiffs-appellees' request for attorneys' fees on appeal is denied and the Clerk is ordered to award costs to the plaintiffs in the amount of $67.90.

6/ 9/75 Pltfs. file Report on Meeting Of Counsel And Request For Conference With Court, with cer. of ser. thereon.

7/ 3/75 Plaintiff files Objections to Defendant's Interrogatories with Cert. of Service Attached. kg

8/ 7/75 Pltfs. file Motion to Schedule Conference.

8/ 8/75 Order entered: Pursuant to pltf.'s Motion, a conference is hereby scheduled for the 28th day of Aug., 1975 at 1:00 P.M. for the purpose of discussing the pltf.'s objections to the defts. proposed EPSDT plan. (SE) A. Sharp. (copies to counsel) kg.

8/25/75 Plaintiffs file Memorandum Regarding Non-Complaince of Defendants' Proposed Plan with certificate of service thereon. MS

8/27/75 Deposition of George N. Nichols filed.

8/27/75 Deposition of David Webster filed.

8/27/75 Deposition of Wayne Stanton filed.

8/27/75 Order Entered: A conference with all counsel in the above case is hereby scheduled for Wed., Oct. 15, 1975 at 5:00 p.m. in chambers. (SE) A. Sharp (copies to counsel) kg

9/ 3/75 Deft. files Motion for Continuance with Cert. of Service attached. kg

Order Entered: It is Therefore Ordered, Adjudged and Decreed by this Court that the above named Defts. be allowed until the 15th day of October, 1975 within which to further plead and answer in this case. (SE) A. Sharp. (copies to counsel) kg

9/ 3/75 Plaintiffs file Interrogatories propounded to defendant Stanton with certificate of service thereon. MS

10/ 1/75 Defendants' file Answers to Pltfs'. Interrogatories, with cer. of ser. thereon. aj

10/ 8/75 Order entered: The conference with all counsel in the above case scheduled for Wednesday, October 15, 1975 at 5:00 o'clock P.M. is hereby cancelled and set aside. SE. Allen Sharp, Judge copies to counsel HB

3/10/76 Certified copy of order received from Court of Appeals AFFIRMING decision of this court. HB

(1 vol. of pleadings returned)

3/17/76 Notice sent setting cause for a motion and status call at 10:30 A.M. on June 17, 1976. SE Allen Sharp, Judge copies to counsel HB

5/ 7/76 Received Order from Court of Appeals: It appearing that the portion of this court's order of Feb. 19, 1976 denying appellees' application for costs of printing briefs on appeal was entered through clerical error, It Is Hereby Ordered that said order is correction to deny only that portion of appellees' application requesting the award of attorneys' fees.

It Is Further Ordered that the Clerk of this Court prepare an itemized statement of costs containing those costs submitted in appellees' application that are otherwise recoverable under F.R.A.P. 39 (c) and transmit such itemized

statement to the Clerk of the District Court forthwith. HB

6/10/76 Spoke with Mr. Sanford. Clerks office Ct. of Appeals—he has 1 Vol. of Pleadings—1 Vol. of transcripts and 1 Vol. of Depositions (3 Dep's missing)

Supreme Court, U. S.
FILED
MAY 10 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75 - 1413

WAYNE A. STANTON, et al.,

Petitioners,

- V -

LOUISE BOND, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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School of Law
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BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the U.S. Court of Appeals for the Seventh Circuit has been reported at 528 F.2d 688 (7th Cir. 1976), and appears in the Appendix of the Petition at pages A-1 -- A-7. The opinion of the District Court is unreported and appears in the Appendix of the Petition at pages A-8 -- A-10.

Jurisdiction

See Petition.

Question Presented

See Petition.

Constitutional Provision Involved

See Petition.

Statement of the Case

In addition to what is set forth in the Petition at pages 3 - 5, respondents would add that the basis for the award of attorney fees in this case was the bad faith of the State officials "which necessitated the present injunctive suit," 528 F.2d at 690.

Argument

The considerations governing review on certiorari are set forth in Rule 19 of the Rules of the Supreme Court. Section 19(1)(b) controls this case and, although not explicitly stated in the Petition, the only apparent basis for granting the writ is that the Seventh Circuit "has rendered a decision in conflict with the decision of another court of appeals on the same matter."

Although it is arguable that there is a conflict in the circuits, a close examination of the decisions indicates that the only conflict may be within a circuit, i.e. the Sixth.

Relying on this Court's holding in Hicks v. Miranda, 422 U.S. 332, 344-45 (1975), the Seventh Circuit affirmed the award of attorney fees on the ground

> that the Supreme Court's summary affirmance of the district court's award of attorneys' fees against state officials in their official capacity [in Sims v. Amos, 409 U.S. 492 (1972)] was a decision on the merits of the immunity issue presented to us in this case.

528 F.2d at 691. The court further indicated that it did "not find in Edelman v. Jordan evidence of an intention to overrule Sims or of a doctrinal development indicating that Sims would be decided differently today." Id.

This ruling by the Seventh Circuit that the eleventh amendment does not bar an award of attorney fees against state officials brings it into conformity with at least four other circuits. They are the First Circuit in Sousa v. Travisono, 512 F.2d 1137 (1st Cir.), vac. and remanded for further consideration in light of Alyeska (presumably because of reliance on the private attorney general theory), 96 S.Ct. 19 (1975);[1] the Second Circuit in Jordan v. Fusari, 496 F.2d 646 (2nd Cir. 1974), Class v. Norton, 505 F.2d 123 (2nd Cir. 1974), and Fitzpatrick v. Bitzer, 519 F.2d 559 (2nd Cir.), cert. granted 96 S.Ct. 561 (1975) (argued April 21, 1976); the Fourth Circuit in Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975); and the Ninth Circuit in Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

Three other circuits which have discussed the issue are less clear, although none of them can definitely be said to be in direct conflict with the Seventh plus the four listed above. Currently the Fifth Circuit can best be characterized as having no position on the issue. Although it has considered the issue, most recently in two en banc rulings, Newman v. State of Alabama,

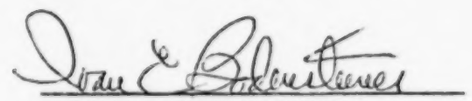
[1] Since the affirmance by the Seventh Circuit was based on the defendants' bad faith rather than the private attorney general theory, clearly there is no Alyeska problem in this case. 528 F.2d at 689-90.

522 F.2d 71 (5th Cir. 1975) and Gates v. Collier, 522 F.2d 81 (5th Cir. 1975), it remanded the question to the district courts.[2] While the Third Circuit has arguably held that the eleventh amendment bars an award of attorney fees in the case of Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), vac. and remanded, 95 S.Ct. 1986 (1975), it is apparent that Skehan did not specifically rule on the eleventh amendment issue. This was made clear in the case of Downs v. Dept. of Public Welfare, 65 F.R.D. 557, 560 (E.D. Pa. 1974), a decision of a district court within the Third Circuit holding that Skehan was not controlling on the eleventh amendment issue. Therefore, the only possible source of a conflict in the circuits is the Sixth Circuit. However, as noted by the court below, it is quite apparent that the Sixth Circuit does not have a definite position on the issue and it depends on the panel of judges.

> In the Sixth Circuit, two panels have not followed Sims. Jordon v. Gilligan, 500 F.2d 701, 710 (6th Cir. 1974), cert. denied, 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975); Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), vacated for further consideration in light of Alyeska (presumably as to the part of the opinion upholding an award against a defendant individually on a private attorney general theory), 421 U.S. 982, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In an intervening decision, Milburn v. Huecker, 500 F.2d 1279 (6th Cir. 1974), another panel permitted an award of attorneys' fees in an opinion which denies retroactive welfare benefits on the ground of Edelman's interpretation of the eleventh amendment, but, in discussing attorneys' fees, makes no reference to Edelman, or the amendment although citing Sims. Milburn was cited in Taylor only for another point. 503 F.2d at 904. Judge Edwards dissented in Taylor, arguing, inter alia, that Sims was binding. 503 F.2d 906, 907-908.

528 F.2d at 690 n.2.

In conclusion, it is respondents' position that there is not a conflict in the circuits on the issue of whether or not the eleventh amendment bars an award of attorney fees against state officials. Since petitioners have advanced no other basis for granting certiorari in this case, the Petition must be denied.



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[2] On remand, the district court in Gates v. Collier, 44 U.S.L.W. 2405 (N.D. Miss., Feb. 3, 1976), ruled that the eleventh amendment does not bar an award of attorney fees.

FOR ARGUMENT

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Question Presented for Review	3
Statement of the Case	3
Facts Material to the Consideration of the Question Presented	3
Argument:	
1. The Eleventh Amendment is an Absolute Bar to an Award of Attorney Fees Against State Officials Sued in Their Official Capacities in the Absence of any Statute Authorizing Such an Award	6
Conclusion	12

TABLE OF AUTHORITIES

Cases

	Page
Bond v. Stanton, Civil No. 73H184, January 13, 1975	2, 3
Bond v. Stanton, 372 F. Supp. 872 (N.D. Ind., 1974)	4
Bond v. Stanton, 528 F. 2d 688 (7th Cir., 1976)	1
Edelman v. Jordan, 415 U.S. 651 (1974)	9, 10
Fitzpatrick v. Bitzer, Slip Opinion, June 28, 1976	6, 9
Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945)	8
Goldberg v. Kelly, 397 U.S. 254 (1970)	10
Graham v. Richardson, 403 U.S. 365 (1971)	10
Hallmark Clinic v. North Carolina Department of Human Resources, 519 F. 2d 1315 (4th Cir., 1975)	7
Jordan v. Gilligan, 500 F. 2d 701 (6th Cir., 1974)	7
Murgia v. Commonwealth of Massachusetts Board of Retirement, 386 F. Supp. 179 (D.C. Mass., 1974)	7
Named Indiviàual Members of the San Antonio Conservation Society v. Texas Highway Department, 496 F. 2d 1017 (5th Cir., 1974)	8
Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 1972)	7
Skehan v. Board of Trustees of Bloomsburg State College, 501 F. 2d 31 (3d Cir., 1974)	8
Taylor v. Perini, 503 F. 2d 899 (6th Cir., 1974)	7

Constitutional and Statutory Provisions

	Page
Eleventh Amendment to the Constitution of the United States	2, 3, 4, 6, 8, 10, 11
Fourteenth Amendment to the Constitution of the United States	9
28 U.S.C. § 1254 (1)	2
28 U.S.C. § 1331	4
28 U.S.C. § 1343 (3)	4
28 U.S.C. § 1343 (4)	4
28 U.S.C. § 2101 (c)	2
28 U.S.C. § 2201	4
28 U.S.C. § 2202	4
42 U.S.C. § 1396 d (a) (4) (B)	4
42 U.S.C. § 1983	3, 4, 7, 10

Other Authorities

Rule 19 (1)(b) of the Rules of the Supreme Court of the United States	2
45 CFR 249.10 (a)(3)	4

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Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

BRIEF OF PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) has been reported as *Bond v. Stanton,* 528 F.2d 688 (7th Cir., 1976). A copy of said opinion has been appended to the Petition

for Writ of Certiorari (hereafter Petition) at page A-1. The January 13, 1975, Order of the United States District Court for the Northern District of Indiana, Hammond Division (hereafter District Court) in *Bond v. Stanton,* Civil No. 73 H 184, has not been officially reported, but is appended to the Petition at page A-8.

Two Orders of the Seventh Circuit dated June 3, 1975, and February 19, 1976, denying applications for attorney fees in this cause have been appended to the Petition at pages A-11 and A-13 respectively.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1) (b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on an important federal-state question in a way in conflict with the United States Courts of Appeals for the Third Circuit, the Fourth Circuit, the Fifth Circuit, and the Sixth Circuit.

The decision of the Seventh Circuit was entered on January 7, 1976. The Petition was timely in that it was filed on April 6, 1976, which was prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

42 U.S.C. § 1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Amendment to the Constitution of the United States is an absolute bar to an award of attorney fees against officials of the State of Indiana when such an award is made against them in their official capacities.

STATEMENT OF THE CASE

The Petition herein arose from an affirmance by the Seventh Circuit of an Order issued by the District Court in the case of *Bond v. Stanton,* Civil No. 73 H 184, whereby the District court ordered the Petitioners herein to pay $2,366.00 in attorney fees for Respondents' (Plaintiffs below) counsel.

Facts Material to the Consideration of the Questions Presented

The original lawsuit was commenced on July 23, 1973, when Plaintiffs filed a complaint in the District Court alleging that Indiana's Early and Periodic Screening, Diagnoses and Treatment (hereafter EPSDT) program was unacceptable under the statutes and regulations of the Congress of the United States, and seeking an injunc-

tion mandating the State to institute an acceptable EPSDT program.

The action by Plaintiffs was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1343 (3) and (4), 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 28 U.S.C. 1331, and was decided on cross motions for Summary Judgment in favor of Plaintiffs. 372 F. Supp. 872 (N.D. Ind., 1974). The District Court held that the State of Indiana through its Welfare Department had not complied with a provision of the Social Security Act, 42 U.S.C. § 1396d (a) (4) (B), as of March 1, 1974. The Court permanently enjoined Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them "from continuing to administer EPSDT in violation of 42 U.S.C. § 1396d (a) (4) (B) and the regulations established thereunder, 45 CFR 249.10(a) (3)," and further, "Defendants are ordered to have a program of Early and Periodic Screening Diagnoses and Treatment (EPSDT) in effect in every county by July 1, 1974."

The decision of the District Court was affirmed by the Seventh Circuit on October 30, 1974. 504 F. 2d 1246. Certiorari was denied on March 17, 1975. 95 S. Ct. 1415 (1975). In the meantime, the District Court, on January 13, 1975, entered its Order granting attorneys' fees to Plaintiffs' attorneys in the amount of $2,366.00, finding that there was a lack of good faith on the part of the Defendants in implementing the EPSDT program, and holding that the Eleventh Amendment did not bar an award of attorneys' fees against state officials. The Seventh Circuit affirmed that Order on January 7, 1976.

In an order dated June 3, 1975, issued upon a request for attorneys' fees by Plaintiffs following the appeal by the Petitioners herein of the case on the merits, the Seventh

Circuit stated that the case was ". . . not an appropriate case for utilization of the 'common benefit' or 'common fund' theory," and further held that there was no evidence that the Defendants were in bad faith in prosecuting an appeal. Petition Appendix, page 11.

On February 19, 1976, the Seventh Circuit denied Plaintiffs' request for attorneys' fees following the appeal by Petitioners of the award of attorneys' fees by the District Court. Petition Appendix, page 12.

ARGUMENT

I

The Eleventh Amendment is an Absolute Bar to an Award of Attorney Fees Against State Officials Sued in Their Official Capacities in the Absence of any Statute Authorizing Such an Award.

This case has changed somewhat between the filing of the Petition and this brief on the merits due to the intervening decision of this Court in *Fitzpatrick v. Bitzer,* slip opinion, June 28, 1976. However, while that decision does eliminate the Eleventh Amendment in some cases involving states and an award against them for attorney fees, it solidifies the Petitioners' position that the decision of the Seventh Circuit under review herein must be overruled.

The Petitioners would submit that attorney fees are not chargeable against them due to the applicability of the Eleventh Amendment to the Constitution of the United States, which provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign State."

The issue of the Eleventh Amendment bar to an award of attorney fees against state officials has been decided differently by various Circuit Courts of the United States Court of Appeals. In this case the Seventh Circuit held that the Eleventh Amendment is not a bar, and stated that it considered itself ". . . bound by the Supreme Court's

summary affirmance in *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.), aff'd, 409 U.S. 942 (1972)." However, the decision of the Seventh Circuit to follow the summary affirmance of *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala., 1972) is contrary to decisions of the Third, Fourth, Fifth and Sixth Circuits, and is contrary to this Court's summary affirmance of *Murgia v. Commonwealth of Massachusetts Board of Retirement,* 386 F. Supp. 179 (D.C. Mass. 1974) aff'd 421 U.S. 972 (1975).

In the case of *Jordan v. Gilligan,* 500 F. 2d 701 (6th Cir., 1974) cert. denied 95 S. Ct. 1996 (1975), the Sixth Circuit stated, at pages 709 and 710:

> "Careful study of the Edelman opinion leads us to conclude, as did the Third Circuit, that the Eleventh Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states . . . The Amendment bars any award which is 'measured in terms of monetary loss resulting from a past breach of legal duty on the part of the Defendant state officials.' *Edelman, supra,* 94 S. Ct. at 1358."

Gilligan was reaffirmed in *Taylor v. Perini,* 503 F. 2d 899, 901 (6th Cir., 1974) vacated on other grounds, 421 U.S. 98 (1975):

> ". . . The propriety of an award of attorneys' fees by a federal court against a state or its officials acting in their official capacity has been settled in this Circuit by our recent holding in *Jordan v. Gilligan,* 500 F. 2d 701 (6th Cir., 1974) that such an award is barred by the Eleventh Amendment."

Accord, *Hallmark Clinic v. North Carolina Department of Human Resources,* 519 F. 2d 1315 (4th Cir., 1975). Both *Taylor* and *Hallmark Clinic* are cases arising under 42 U.S.C. § 1983, as is the case at bar.

The Fifth Circuit has found the Eleventh Amendment to be a bar to an award of attorney fees against state officials in the case of *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department,* 496 F. 2d 1017 (5th Cir., 1974), cert. denied 420 U.S. 926 (1975). In addition, the Third Circuit has indicated agreement with the principle in *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F. 2d 31 (3d Cir., 1974), vacated on other grounds, 421 U.S. 983 (1975).

Thus, the decision of the Seventh Circuit is contrary to decisions of the Third, Fourth, Fifth and Sixth Circuits.

Any recovery of attorney fees by the plaintiffs in this cause would not come from the named defendants, who are merely nominal parties, but would come from the State Treasury. In fact, the Order of the District Court specifically stated as follows:

> "Therefore, it is hereby ordered that the plaintiffs request for attorney fees is granted and the defendants, Wayne A. Stanton, Marion Hilger, Robert Curless, Arvella Stanton, Robert G. Watson, Jr. and James Burnett, *in their official capacities* are hereby ordered to pay the sum of $2,366.00 to the plaintiffs as attorney fees . . ." (Emphasis supplied.) Pet. App. p. A-10.

As this Court said in *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945) at page 464:

> ". . . When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

That statement was cited with approval in the case of *Edelman v. Jordan,* 415 U.S. 651, 663 (1974) wherein this Court stated:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."

In *Fitzpatrick v. Bitzer, supra,* at page 10, this Court in discussing § 5 of the Fourteenth Amendment to the Constitution of the United States, held:

> ". . . In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, supra.*

III

"In No. 75-283, the state officials contest the Court of Appeals' conclusion that an award of attorney's fees in this case would under *Edelman* have only an "ancillary effect" on the state treasury and could therefore be permitted as falling outside the Eleventh Amendment under the doctrine of *Ex parte Young, supra.* 415 U.S., at 667-668. We need not address this

> question, since, given the express congressional authority for such an award in a case brought under Title VII, it follows necessarily from our holding in No. 75-251 that Congress' exercise of power in this respect is also not barred by the Eleventh Amendment . . ."

The case involved herein was brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Neither at the time of the passage of the original act nor at any time since has Congress seen fit to provide for the recovery of attorney fees to a prevailing litigant. Therefore, since there is no statutory authorization permitting the recovery of attorney fees from the State under § 1983, the State is entitled to invoke its Eleventh Amendment immunity.

That immunity *prohibits* a monetary award against a state, and obviates any need to discuss an "ancillary effect" on a state treasury that such an award might have. The State does realize however, that certain decisions have allowed attorney fees against a state treasury on the grounds that such an award would fall within *Edelmans'* "ancillary effect." However, the State does not feel the term "ancillary effect" means anything other than what this Court stated in discussing *Graham v. Richardson*, 403 U.S. 365 (1971) and *Goldberg v. Kelly*, 397 U.S. 254 (1970) in *Edelman*, 415 U.S. at 667-668:

> ". . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. *State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary*

> *effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.*

But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. *It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard.* While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of monetary loss resulting from a past breach of a legal duty, on the part of the defendant state officials. (Emphasis supplied.)

Thus, the term "ancillary effect" does not encompass all expenses, costs and fees of a prevailing litigant, but only that expense necessary for the State to prospectively comply with a court's order.

The State would also submit that the finding of a lack of good faith on the part of the Petitioners herein does not overcome the Eleventh Amendment bar to an award of attorney fees against the State Treasury in the absence of statutory authorization. While a lack of good faith has traditionally been an exception to the American rule prohibiting attorney fees, that exception does not overcome the bar of the Eleventh Amendment so as to operate against a state.

CONCLUSION

For these reasons, the decision of the Seventh Circuit must be reserved.

Respectfully submitted,

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OCTOBER TERM, 1976

NO. 75-1413

WAYNE A. STANTON, etc., *et al.*,

Petitioners,

v.

LOUISE BOND, etc., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. AN AWARD OF ATTORNEY FEES AGAINST STATE OFFICIALS IS ANALOGOUS TO THE TAXING OF COSTS OF LITIGATION, WHICH IS NOT BARRED BY THE ELEVENTH AMENDMENT	4
II. ATTORNEY FEES HAVE A PERMISSIBLE "ANCILLARY EFFECT ON THE STATE TREASURY" WHICH IS NOT BARRED BY THE ELEVENTH AMENDMENT	9
CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975)	3,11
Bond v. Stanton, 372 F. Supp. 872 (N.D. Ind. 1974), *aff'd,* 504 F.2d 1246 (7th Cir. 1974), *cert. denied,* 420 U.S. 984 (1975)	2,10
Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975)	6,7
Class v. Norton, 505 F.2d 123 (2d Cir. 1974)	7,12
Downs v. Department of Public Welfare, 65 F.R.D. 557 (E.D. Pa. 1974)	8,16
Edelman v. Jordan, 415 U.S. 651 (1974)	*passim*
Employees v. Department of Public Health and Welfare, 411 U.S. 270 (1973)	14,15,16

Page

Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927) 3,4,5,6,7,9

Fitzpatrick v. Bitzer, ____ U.S. ____, 96 S. Ct. 2666 (1976) 3,5,7,14

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 3

Goldberg v. Kelly, 397 U.S. 254 (1970) 10,11

Graham v. Richardson, 403 U.S. 365 (1971) 10,11

Hall v. Cole, 412 U.S. 1 (1973) 3

Hallmark Clinic v. North Carolina Dept. of Human Res., 380 F. Supp. 1153 (E.D.N.C. 1974), *aff'd*, 519 F.2d 1315 (4th Cir. 1975) 13

Hutchinson v. Lake Oswego School District No. 7, 519 F.2d 961 (9th Cir. 1975) 7

Illinois v. Allen, 397 U.S. 337 (1970) 15

Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974) 12

Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1974) 5,8,12,13

LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd* 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974) 8

Massachusetts Bd. of Retirement v. Murgia, ____ U.S. ____, 96 S. Ct. 2562, 2564 n.1 (1976) 13

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 3,8

Monaco v. Mississippi, 292 U.S. 313 (1933) 5

Murgia v. Commonwealth of Mass. Bd. of Retirement, 386 F. Supp. 179 (D. Mass.), *aff'd*, 421 U.S. 972 (1975) 8,13

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 8

Parden v. Terminal R. Co., 377 U.S. 184 (1964) 14

Runyon v. McCrary, ____ U.S. ____, 96 S. Ct. 2586 (1976) 3

Page

Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) 8,13

Snyder v. Massachusetts, 291 U.S. 97 (1934) 15

Sousa v. Travisano, 512 F.2d 1137 (1st Cir. 1975), *vacated and remanded for consideration in light of Alyeska*, 423 U.S. 809 (1975) 7,12

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 3,6

Swanson v. American Consumer Industries, Inc., 517 F.2d 555 (7th Cir. 1975) 6

Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded for further consideration in light of Alyeska*, 421 U.S. 982 (1975) 8

Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975) 7,13

Wood v. Strickland, 420 U.S. 308 (1975) 16

Ex parte Young, 209 U.S. 123 (1908) 10,11,12,16,17

Miscellaneous:

6 J. Moore, Federal Practice 8

Note, Attorneys' Fees and the Eleventh Amendment, 88 Harv. L. Rev. 1875 (1975) 11,14

Statutes:

Civil Rights Act, 42 U.S.C. §1983 1,16

Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) *et seq.* 14

Interstate Commerce Act, 49 U.S.C. §16(2) 8

Securities Act, 15 U.S.C. §77k(e) 8

Emergency School Aid Act of 1972, 20 U.S.C. §1617 8

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Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTION PRESENTED

Whether a federal court, after finding bad faith on the part of state officials which necessitates litigation and occurs during the course of the litigation, has the power to order the state officials to pay the plaintiffs reasonable attorney fees in an action under 42 U.S.C. § 1983.

A. Whether an award of attorney fees is analogous to taxing of court costs against state officials which is not barred by the eleventh amendment.
B. Whether an award of attorney fees has a permissible "ancillary effect on the state treasury" which is not barred by the eleventh amendment under *Edelman v. Jordan.*

STATEMENT OF THE CASE

Petitioners' statement of the case is misleading in two respects. First, plaintiffs' complaint challenged more than the acceptability of Indiana's EPSDT program; it also challenged the failure of the defendants to have *any* program in eighty-four (84) of the ninety-two (92) counties in the State. Second, the district court found bad faith on the part of the defendants both in necessitating the litigation ("they were more than two years late in even attempting to implement a statewide EPSDT program") and in their conduct during the litigation (they "continually asserted compliance with HEW requirements in the face of documentation to the contrary"). This finding was affirmed below, *Bond v. Stanton,* 528 F.2d 688, 690 (7th Cir. 1976), and has not been challenged in this Court.

SUMMARY OF ARGUMENT

This Court has recognized on several occasions that attorney fees are properly a part of equitable relief where there has been a finding of bad faith.

> Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166 (1939), and federal courts do not hesitate to exercise this *inherent equitable power* whenever 'overriding considerations indicate the need for such a recovery.' *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391-92 (1970); *see Fleishman Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718 (1967). (emphasis added)

Hall v. Cole, 412 U.S. 1, 5 (1973).[1] Since the district court has found bad faith, a finding not at issue in this Court, the only issue is whether the award is barred by the eleventh amendment. Respondents contend that the eleventh amendment does not prohibit the award of attorney fees granted by the district court, and affirmed by the Court of Appeals below, for several reasons.

First, they argue that attorney "fees [are] in the same category as other litigation costs," *Fitzpatrick v. Bitzer,* ____ U.S. ____, 96 S. Ct. 2666, 2673 (1976) (Stevens, J., concurring), which are not barred by the eleventh amendment. *See Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70 (1927). The analogy between attorney fees and costs is particularly appropriate where, as here, the basis for the award of fees is the bad faith of the state officials who were found to have caused the litigation.

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[1] The bad faith exception to the American rule regarding attorney fees is still recognized even after the generally limiting decision in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 258-59 (1975). ("These exceptions [including bad faith] are unquestionably assertions of inherent power in the courts to allow attorneys' fees. . . ."). *See also, Runyon v. McCrary,* ____ U.S. ____, 96 S. Ct. 2586, 2600 (1976).

Second, it is argued that an award of attorney fees has only an "ancillary effect on the state treasury" which is permissible under this Court's decision in *Edelman v. Jordan*, 415 U.S. 651 (1974). Attorney fees, like other incidental litigation expenses, are a necessary consequence of suits seeking to require state officials who have acted in bad faith to comply with federal law in the future. Such fees are *not* damages and are *not* "measured in terms of monetary loss resulting from a past breach of a legal duty." *Id.* at 668.

ARGUMENT

I.

AN AWARD OF ATTORNEY FEES AGAINST STATE OFFICIALS IS ANALOGOUS TO THE TAXING OF COSTS OF LITIGATION, WHICH IS NOT BARRED BY THE ELEVENTH AMENDMENT

There is no eleventh amendment bar to the award of attorney fees in this case since they are clearly analogous to costs which have been held recoverable against states. At least since *Fairmont Creamery Co. v. Minnesota*, 292 U.S. 70 (1927), this Court has recognized that, in both civil and criminal litigation, states have no immunity from the award of costs. *Fairmont Creamery* involved a claim that the doctrine of sovereign immunity barred the Supreme Court's award of costs against the State of Minnesota following reversal of a state criminal conviction on constitutional grounds. The Court viewed the award of such costs as

incident to its jurisdiction and "the invariable practice" of the courts. *Id.* at 77. Although the Court was interpreting the doctrine of sovereign immunity, the principles clearly apply here because the eleventh amendment is a constitutional embodiment, *albeit partial*, of the common law doctrine of sovereign immunity. *See Monaco v. Mississippi*, 292 U.S. 313, 330 (1933); *Fitzpatrick v. Bitzer, supra*, 96 S. Ct. at 2671; *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1974).

In a recent decision by the First Circuit, the *Fairmont Creamery* case was applied to uphold a levy of costs against the state. The court there held:

> In *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S. Ct. 97, 72 L. Ed. 168 (1928), there is support for the view that the power to tax court costs is to be characterized as an incident to the hearing and not within the scope of a state's sovereign immunity if the federal court's exercise of jurisdiction over the state party in the action in the main is valid. The Court in *Fairmont* held that sovereign immunity did not protect a state against a judgment for costs in litigation before the Supreme Court on an appeal from the final judgment of the highest state court. While acknowledging that a sovereign is immune from costs awarded by its own courts, the Court stated that a state loses some of its sovereign character when it is forced to appear before the Supreme Court under the Supremacy Clause on a matter of federal and constitutional law. According to the Court the 'incidents of the hearing are those which attach to the regular jurisdiction of this Court,' and the awarding of costs was one such incident that had been 'the invariable practice' in judgments against a state in both civil and criminal cases before that Court. *Id.* at 77, 48 S. Ct. at 100.
>
> * * *

> In view of the above consideration and precedents, we conclude that the Eleventh Amendment does not immunize appellants from being taxed for costs.

Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1029 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975).

The awarding of costs is clearly not an award of a money judgment as punishment for the past breach of a legal duty by state officials, but is merely an incident to the granting of injunctive and declaratory relief. Thus, *Edelman v. Jordan, supra,* cannot be held to bar costs since it held only that the eleventh amendment bars retroactive welfare payments which are "indistinguishable in many aspects from an award of damages" for past breaches of legal duties. *Id.* at 668. No mention was made in *Edelman* of *Fairmont Creamery* and, without a doubt, the latter case survives the former.

If costs can be loosely defined as expenses of litigation, then it seems that attorney fees are of the same class. Of course, the two are not identical, as recognized in *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939), and *Swanson v. American Consumer Industries, Inc.,* 517 F.2d 555 (7th Cir. 1975); however, they are generically the same. Following the decision in *Boston Chapter N.A.A.C.P. Inc. v. Beecher, supra,* the First Circuit soon made the analogy between costs and attorney fees:

> If, as we held in *Boston Chapter N.A.A.C.P.* the eleventh amendment allows costs to be assessed against state officials, it is hard to see why it should bar attorneys' fees. Both are in similar relationship to the main litigation and both should

> stand or fall together. It is true that there is less sanction in our law for attorney's fees; and the awarding of fees in these precise circumstances and upon the rationale we approved in *Hoitt* has yet to be considered by the Supreme Court. Conceivably costs, being more traditional than attorneys' fees, are allowable, but attorneys' fees are not. Conceivably attorneys' fees based on certain rationales are allowable but others are not. Nonetheless whatever the situations ultimately deemed suitable for the award of the attorneys' fees, *such fees,* to the extent allowable, *seem to us generically to be the same as court costs. They are a part of the litigation expense deemed,* for whatever reason, *recoverable by the successful party or attorney.* Any effort to distinguish for eleventh amendment purposes on the basis of theories of award would invite endless confusion. And to the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others. To that extent, as the Supreme Court said in *Fairmont,* a state may lose 'some of its sovereign character.' 275 U.S. at 77, 48 S. Ct. 97. Accordingly, for reasons set forth in *Boston Chapter, N.A.A.C.P.,* we hold that attorneys' fees, like costs, are not barred by the eleventh amendment. (emphasis added)

Sousa v. Travisano, 512 F.2d 1137, 1140 (1st Cir. 1975), *vacated and remanded for consideration in light of Alyeska* (presumably because of reliance on private attorney general theory), 423 U.S. 809 (1975).[2]

[2] *See also Fitzpatrick v. Bitzer,* ____ U.S. ____, 96 S. Ct. 2666, 2673 (1976) (Stevens, J., concurring); *Thonen v. Jenkins,* 517 F.2d 3, 7-8 (4th Cir. 1975); *Hutchinson v. Lake Oswego School District No. 7,* 519 F.2d 961, 967-68, n.8 (9th Cir. 1975); *Class v. Norton,* 505 F.2d 123, 126 (2d Cir. 1974); *(continued)*

This Court in attorney fee cases not involving the eleventh amendment has discussed fees as part of costs. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), the Court directed the district court to "include reasonable counsel fees as part of the costs" and in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970), it recognized that generally attorney fees are not allowed as part of costs, but the Court went on to award fees under one of the exceptions to the general rule. Congress too has provided for attorney fees as part of costs in several statutes, *e.g.*, Interstate Commerce Act, 49 U.S.C. §16(2); Securities Act, 15 U.S.C. §77k(e); Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k); Emergency School Aid Act of 1972, 20 U.S.C. §1617. In the latter two enactments, it is clear that states or state officials could be defendants, thus evidencing an interpretation by Congress that the eleventh amendment does not bar an award of attorney fees by a federal court against a state. In these statutes recognizing the validity of awards of attorney fees as

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(footnote continued from preceding page)

LaRaza Unida v. Volpe, 57 F.R.D. 94, 101-2, n.11 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974); *Downs v. Department of Public Welfare*, 65 F.R.D. 557 (E.D. Pa. 1974); *Sims v. Amos*, 340 F. Supp. 691, 694, n.8 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972). *Contra, Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974), *vacated and remanded for further consideration in light of Alyeska*, 421 U.S. 982 (1975); *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); *Murgia v. Commonwealth of Mass. Bd. of Retirement*, 386 F. Supp. 179 (D. Mass.), *aff'd*, 421 U.S. 972 (1975), summary affirmance of decision denying attorneys' fees as a matter of discretion as well as law. *See also* 6 J. MOORE, FEDERAL PRACTICE ¶54.77(2), at 1703 (2d ed. 1976).

part of costs, Congress has treated the two as generically the same and has clearly differentiated attorney fees from awards of back pay and damages.

To classify attorney fees as similar to costs is not an evasion of the eleventh amendment unlike the labeling of retroactive damages as "equitable restitution" in *Edelman, supra* at 665-66. *Edelman* recognized that a state may be required to expend funds incidentally in complying with a federal court injunction. In this case, a state may be required to pay the prevailing party expenses of litigation, including both costs and attorney fees, which are incident to a decree granting declaratory and injunctive relief. Such an award is not damages; it is merely implicit in federal court jurisdiction over the state on a matter of federal law. *Fairmont Creamery, supra.* For these reasons, the eleventh amendment does not bar the award of attorney fees against the state.

II.

ATTORNEY FEES HAVE A PERMISSIBLE "ANCILLARY EFFECT ON THE STATE TREASURY" WHICH IS NOT BARRED BY THE ELEVENTH AMENDMENT

In *Edelman v. Jordan*, 415 U.S. 651 (1974), this Court held:

> The court of appeals was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the district court decree *which ordered retroactive payments of benefits* found to have been wrongfully withheld. (emphasis added)

Id. at 678. Clearly in *Edelman* this Court was concerned only with *retroactive welfare payments*

which it indicated were "in practical effect indistinguishable in many aspects from an award of damages against a state." *Id.* at 668. In barring retroactive welfare payments, the Court affirmed the principles of *Ex parte Young*, 209 U.S. 123 (1908), regarding prospective injunctive relief and recognized that subsequent decisions "have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*." *Id.* at 667. After discussing the impact on the state treasuries of the equitable relief ordered in *Graham v. Richardson*, 403 U.S. 365 (1971), and *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court stated:

> But the fiscal consequences to state treasuries in those cases were the *necessary result of compliance with decrees which by their terms were prospective in nature*. State officials, in order to shape their official conduct to the mandate of the court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. *Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.* (emphasis added)

Id. at 667-68. The real meaning, then, of *Edelman* is clear: retroactive welfare payments are barred by the eleventh amendment, but the fiscal consequences to the state treasury of prospective equitable relief are not barred.

Application of *Edelman* to this case is quite simple. Clearly the relief granted by the district court, *Bond v. Stanton*, 372 F. Supp. 872 (N.D. Ind. 1974), *aff'd*, 504 F.2d 1246 (7th Cir. 1974), *cert. denied*, 420 U.S. 984 (1975), was prospective in nature, *i.e.*, the defendants

were ordered to institute an EPSDT program in compliance with mandatory federal law in the future. Like injunctive relief in *Graham, supra,* and *Goldberg, supra,* this injunctive relief will inevitably have fiscal consequences on the Indiana treasury, *e.g.*, the cost of implementing an EPSDT program in compliance with federal law; the cost of defending the case on the merits in the district court, the Court of Appeals and a petition for a writ of certiorari to this Court; allowable costs in both the district and appellate courts; and *attorney fees.* None of these costs are prohibited by *Edelman.*

The lengthy discussion of the history and nature of attorney fees in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975), makes it quite apparent that attorney fees are different from damages and the retroactive welfare payments involved in *Edelman.*[3] Rather, for eleventh amendment purposes, attorney fees represent a cost incidental to securing the prospective relief permitted under *Ex parte Young* and *Edelman* and, therefore, they have a permissible "ancillary effect on the state treasury." Contrary to retroactive welfare payments, attorney fees are not a form of compensation "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman, supra,* at 668. Instead, they are a "necessary consequence of [securing] compliance in the future with a substantive federal-question determination." *Id.*

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[3] *See also* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1895-96 (1975).

At least two circuit courts of appeals have adopted the "ancillary effect" theory. In *Jordan v. Fusari,* 496 F.2d 646 (2d Cir. 1974), the Second Circuit stated:

> Moreover, it appears to us that the allowance awarded here, as part of an order granting injunctive relief, has at most the 'ancillary effect on the state treasury,' which *Edelman v. Jordan, supra,* 415 U.S. at 668, characterizes as 'a permissible and often inevitable consequence of the principle announced in *Ex parte Young.*' 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

Id. at 651. In this unemployment compensation case, although the court found that the state had waived its protection under the eleventh amendment, it clearly forecast the subsequent result in *Class v. Norton,* 505 F.2d 123 (2d Cir. 1974). In *Class,* the court reaffirmed the language of *Fusari* set out above and upheld an attorney fee award of One Thousand Dollars ($1,000) against the state. *Id.* at 126. The First Circuit, in *Sousa v. Travisano, supra,* although relying primarily on the analogy to costs, also held that attorney fees are incidental to the main litigation.

> On the other hand, *the fees are incidental to the main litigation,* which, being for injunctive and declaratory relief, was permissible under the Eleventh Amendment. An award of attorneys' fees is perhaps so 'ancillary' as to be constitutional, even though there will be some drain on the state treasury. (emphasis added)

Id. at 1139.

Petitioners rely primarily on *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir. 1974), *cert. denied,* 421 U.S. 991 (1975), for their interpretation of *Edelman.* The Sixth Circuit interpreted *Edelman* as barring any award which is:

> 'measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.' *Edelman, supra,* 94 S. Ct. at 1358. In our opinion, awards of attorney's fees fall within that classification and are, therefore, barred.

500 F.2d at 710. Reliance on the above quotation from *Edelman* not only ignores the "ancillary effect" doctrine, but it also takes a statement from *Edelman* entirely out of context. The statement was made by this Court not in describing what is barred by the eleventh amendment, but rather in discussing how a monetary, retroactive award is "in practical effect indistinguishable in many aspects from an award of damages against the state." 415 U.S. at 668. Therefore, *Gilligan* is of little value to this Court in making a determination of whether or not attorney fees have an "ancillary effect" on a state treasury which is permitted under the eleventh amendment.[4]

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[4]Petitioners also rely on *Hallmark Clinic v. North Carolina Dept. of Human Res.,* 380 F. Supp. 1153 (E.D.N.C. 1974), *aff'd* 519 F.2d 1315 (4th Cir. 1975) (a *per curiam* decision making no reference to an earlier opinion of the Fourth Circuit, *Thonen v. Jenkins,* 517 F.2d 3, 7 (4th Cir. 1975), which held fees were not barred by the eleventh amendment). However, the decision of the district court, which was affirmed, states:

> We do not think that *Edelman v. Jordan, supra,* completely disposes of this question. An award of attorneys' fees may be regarded as a natural incident of suits against state officers under *Ex parte Young,* . . . .

380 F. Supp. at 1159, n.12. They also cite *Murgia v. Commonwealth of Mass. Bd. of Retirement,* 386 F. Supp. 170 (D. Mass. 1974), *aff'd* 421 U.S. 972 (1975), which, like *Sims v. Amos,* 340 F. Supp. 691 (M.D. Ala.), *aff'd,* 409 U.S. 942 (1972), relied upon by the court below, was a summary affirmance not binding on this Court in plenary considerations. *Edelman v. Jordan,* 415 U.S. 651, 670-71 (1974); *Massachusetts Bd. of Retirement v. Murgia,* ____ U.S. ____, 96 S. Ct. 2562, 2564 n.1 (1976).

Relevant policy considerations also support respondents' position that attorney fees are within the limits of the permissible "ancillary effect" described in *Edelman*. Fee awards would generally involve substantially less money than the retroactive welfare payments at issue in *Edelman*; therefore, serious disruption of the state's budget would be less likely.[5] Where, as here, the state officials have acted in bad faith in conducting the litigation, an award of attorney fees acts as a deterrent to such conduct and assists the federal court in providing an orderly trial process for both parties.[6] Furthermore, the power to award attorney fees is "of particular value in litigation against the states because of the inappropriateness of other sanctions"[7] for purposes of assuring the orderly administration of justice.[8]

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[5] The court in *Edelman* implies that the extent of an award's impact on a state's fiscal planning can be a relevant consideration for eleventh amendment purposes. 415 U.S. at 666, n.11. *See* Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1881, 1896 (1975).

[6] *Id.* at 1892.

[7] *Id.*

[8] This Court has already held that the eleventh amendment is not an absolute bar to a federal court award of attorney fees. *Fitzpatrick v. Bitzer*, ____ U.S. ____, 96 S. Ct. 2666, 2671-72 (1976). In that case it was held that Congress, in enacting 42 U.S.C. §2000e-5(k) pursuant to §5 of the fourteenth amendment and providing for attorney fees as part of costs in Title VII cases, had limited the state sovereignty embodied in the eleventh amendment. *Id.* at 2671. In another context this Court has held that the eleventh amendment is not absolute and can be waived by the conduct of a state. *See Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), distinguished on the facts in *Employees v. Dept. of Public Health & Welfare*, 411 U.S. 270 (1973), and *Edelman, supra.*

(continued)

Respondents urge this Court to adopt the view that an award of attorney fees against state officials is an

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Arguably the bad faith conduct of the defendant state officials in this case not only strengthens the basis for allowing fees as analogous to costs or as a permissible "ancillary effect on the state treasury," but also provides an independent basis for avoiding the eleventh amendment on the ground that its protection has been waived by the conduct of the defendant state officials. While the defendant state officials have not expressly waived the eleventh amendment, this is not necessary under *Parden* where the waiver was based not on express legislative consent but on the state agency's initiation of railroad operations in interstate commerce twenty (20) years after the enactment of the Federal Employers Liability Act. Respondents contend that Indiana's voluntary participation in the federally funded program under the Social Security Act, including acceptance of federal funds, plus the knowing and wilful refusal to abide by the mandatory federal law constitutes a waiver of any protection the eleventh amendment might otherwise provide against an award of attorney fees based on such bad faith conduct.

This Court has held that other recognized immunities and even an individual's constitutional rights can be waived by bad faith and obdurate conduct. For example, in *Illinois v. Allen*, 397 U.S. 337 (1970), misconduct by a criminal defendant in the course of his trial constituted a waiver of his constitutional right to be present at trial and confront witnesses. While the presumption against waiver of such confrontation " 'may be lost by consent or at times *even by misconduct.*' " *Id.* at 343, *quoting Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (emphasis added). The rationale in Allen is particularly appropriate in this case where the state was found to have acted in bad faith during the litigation:

> [O]ur courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. . . . It would degrade our country and our judicial system to permit our courts to be bullied, insulted, or humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes.

(continued)

incidental cost of litigation not barred by the eleventh amendment, just as the cost to a state of implementing injunctive relief is "ancillary" and thus a "permissible and often inevitable consequence of the principle announced in *Ex parte Young*," which is not barred by the eleventh amendment. This interpretation of *Edelman* is particularly reasonable and convincing when considered in conjunction with the remedial and deterrent nature of attorney fees, as succinctly described by the court in *Downs v. Department of Public Welfare*, 65 F.R.D. 557, 561 (E.D. Pa. 1974):

> For these reasons, we believe that an award of counsel fees is both clearly remedial and an integral part of a decree providing for prospective relief from violations of federal statutory and/or constitutional rights. In light of the realities of the

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397 U.S. at 347.

In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court reached a similar conclusion in discussing the common law immunity of state officials under 42 U.S.C. §1983. While not discussed in terms of "waiver" *per se*, it is evident that Wood carved out an exception to the general rule that state officials are not personally liable for acts done pursuant to their official duties. School board members are *not* immune from liability for damages under §1983 where their "action cannot reasonably be characterized as being in good faith." *Id.* at 322. Again, conduct was held to limit an established immunity.

Thus, under *Parden* it is clear that the state can waive its eleventh amendment immunity and this Court has based waiver of other rights and immunities on the bad faith conduct of individuals. By participating in a federal program and by refusing in bad faith to follow the federal mandates controlling that program, the State of Indiana has arguably waived its immunity from the award of attorney fees ordered by the district court.

> economic conditions of those for whom such suits are most frequently brought and the expense of litigation, the fiscal impact of such awards upon the state treasury must be considered an inevitable, and so a permissible, consequence of the principle of *Ex parte Young*, if that principle is to have any practical impact.

CONCLUSION

While this Court has not yet ruled on the effect of the eleventh amendment on a federal court's inherent equitable power to award attorney fees absent express legislative authorization, it is quite clear from the argument presented by respondents that the fees awarded by the lower court in this case are outside the scope of the eleventh amendment as interpreted by this Court in earlier decisions. State officials, clearly subject to the jurisdiction of the federal courts under *Ex parte Young*, cannot be encouraged to cause and prolong litigation by their bad faith conduct. Such obstruction of judicial order and economy can be avoided only by holding the state responsible for the incidental costs of litigation, including court costs and attorney fees, which are caused by the state's official agents. Therefore, the

lower court order awarding attorney fees should be affirmed.

Respectfully submitted,

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Oct. 28

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1975

Number 75-1413

WAYNE A. STANTON, et al.,

Petitioners,

- VS -

LOUISE BOND, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUBJECT INDEX

		Page
I.	INTRODUCTION	1
II.	APPLICATION TO PENDING CASES	3
III.	NEW ACT ELIMINATES ELEVENTH AMENDMENT DEFENSE. .	5
IV.	CONCLUSION	9

TABLE OF AUTHORITIES CITED

Cases

Bradley v. School Board of the City of Richmond, 416 U.S. 696, 94 S. Ct. 2006 (1974). 3, 4, 5, 9

Fitzpatrick v. Bitzer, __U.S.__, 96 S. Ct. 2666 (1976) . 5, 6, 7, 9

Hans v. Louisiana, 134 U.S. 1 (1890) 6

Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281 (1969) 3

Miscellaneous Authorities

122 Cong. Rec. 2, 4, 5, 6, 7, 8

H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. (1976). . . . 2, 4, 7, 8

S. Rep. No. 94-1011, 94th Cong. 2d Sess. (1976). 7

Statutes

42 U.S.C. § 1983 2

20 U.S.C. § 1617 3

Pub. L. No. 94-559 (Oct. 19, 1976) 1, 2

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SUPPLEMENTAL BRIEF OF RESPONDENTS

I.

INTRODUCTION

Respondents submit this Brief pursuant to Rule 41(5) of the Rules of the Supreme Court to bring to the attention of the Court newly enacted legislation not available when their Brief was filed. On October 19, 1976, President Ford signed into law "The Civil Rights Attorney's Fees Awards Act of 1976," Pub. L. No. 94-559 (Oct. 19, 1976),[1] which amends 42 U.S.C. § 1988 by adding the following:

> In any action or proceeding to enforce a provision of §§ 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

On its face the new Act obviously covers actions, such as this, brought under 42 U.S.C. § 1983 (Revised Statutes § 1979) and respondents therefore contend that it resolves the issue pending before this Court. The only possible questions are a) its application to cases pending before its effective date, and b) its effect on the petitioners' eleventh amendment claim. While the Act itself is silent on these two issues, respondents will demonstrate below that the legislative history makes it perfectly clear that the new Act is to apply to all pending cases and that it also contemplates awards of attorney fees against state governments.[2]

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1. The bill, S. 2278, passed in the Senate on September 29, 1976, 122 Cong. Rec. 17053 (daily ed. Sept. 29, 1976), and was brought up in the House by resolution. 122 Cong. Rec. 12150, 12156 (daily ed. Oct. 1, 1976). It passed in the House on October 1, 1976. 122 Cong. Rec. 12167 (daily ed. Oct. 1, 1976). Since S. 2278 is identical to H.R. 15460 reported out of the House Judiciary Committee on September 9, 1976, see 122 Cong. Rec. 12159 (daily ed. Oct. 1, 1976) statement of Mr. Drinan, the report of the House Judiciary Committee is relevant in interpreting this Act. H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976).

2. The language of the Act, providing for attorney fees "as part of the costs," also supports respondents' argument at pp. 4-9 of their Brief that attorney fees are analogous to costs which are not barred by the eleventh amendment.

II.

APPLICATION TO PENDING CASES

The general rule concerning a change in law during the pendency of an action was stated in the case of Bradley v. School Board of the City of Richmond, 416 U.S. 696, 94 S. Ct. 2006 (1974):

> . . . a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. (Emphasis added.)

Id. at 711. See also Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 281 (1969). In Bradley, this Court interpreted Thorpe as

> stand[ing] for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect.

416 U.S. at 715. Bradley involved an attorney fee issue and the court held that the 1972 amendment to section 718 of the Emergency School Aid Act (20 U.S.C. § 1617) providing for attorney fees was to be applied to the case before the court even though the legislative history of § 718 did not explicitly indicate it applied to pending cases, 416 U.S. at 716, and the case had been initiated long before the amendment to the Emergency School Aid Act.

The intent of Congress concerning the application of the new attorney fee act to pending cases was expressed on several occasions during the consideration of this bill. In the Senate on September 29, 1976, Senator Abourezk made the following statement:

> The Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits presently pending in the Federal courts. The application of this Act to pending cases is in conformity with the unanimous decision of the Supreme Court in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).
>
> This application is necessary to fill the gap created by the Alyeska decision and thus avoid the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced.
>
> It will also result in a significant saving of judicial resources. At present, due to the Alyeska decision, a court must analyze a party's actions to determine bad faith in order to award attorneys' fees. This is a complex, time consuming process often requiring an extensive evidentiary hearing. The enactment of this legislation will make such an evidentiary hearing unnecessary in the many civil rights cases presently pending in the Federal Courts.

122 Cong. Rec. 17052 (daily ed. Sept. 29, 1976). On the same date Senator Kennedy made reference to this case in giving examples of cases that would be covered by the new act. He stated:

> In a case now pending, officials accepted Social Security Act funds for years for certain medical screening programs when in fact they had no such programs in most of the State.

Id.[3]

In the House, the same intention was manifested. Beginning with the House Report, it was stated:

> In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. Bradley v. Richmond School Board, 416 U.S. 696 (1974).

3. Representative Drinan, the author of the House bill, specifically pointed out that the act provides for attorneys' fees in "suits against State and local officials based upon Federal statutory as well as constitutional rights. For example, Blue against Craig, 505 F.2d 830 (4th Cir. 1974)." 122 Cong. Rec. 12159 (daily ed. Oct. 1, 1976); see also Statement of Senator Abourezk, 122 Cong. Rec. 17053 (daily ed. Sept. 29, 1976).

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess 4 n.6 (1976). On the floor, Representative Anderson from Illinois stated:

> . . . it would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would depend on the date that the case is filed. I do not think that is the basis on which a determination is made. To that extent, it is retroactive. Pending cases could receive an award of reasonable fees.

122 Cong. Rec. 12155 (daily ed. Oct. 1, 1976). On the same date, Representative Drinan made the following statement:

> I should add also that, as the gentleman from Illinois (Mr. Anderson) observed during consideration of the resolution on S. 2278, this bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation. In Bradley versus Richmond School Board, the Supreme Court expressly applied that long-standing rule to an attorney fee provision, including the award of fees for services rendered prior to the effective date of the statute.

Id. at 12160. Finally, on October 1, 1976, an amendment proposed by Representative Ashbrook which would have expressly limited the new act to cases filed after its effective date was soundly defeated. Id. at 12166.

Therefore, it is quite apparent from the legislative history in both the Senate and House that the new act was to have retroactive application in accordance with the decision of this Court in Bradley v. School Board of the City of Richmond, supra. The sole issue presented in this case, whether the eleventh amendment bars the award of attorney fees, must be considered in light of the new act.

III.

NEW ACT ELIMINATES ELEVENTH AMENDMENT DEFENSE

Last term in Fitzpatrick v. Bitzer, __U.S.__, 96 S. Ct. 2666 (1976), this Court held that both back-pay and attorney fees could be awarded to a successful plaintiff in an action against a state under Title VII of the Civil Rights Act of 1964, as amended in 1972. In considering the eleventh amendment, the Court noted that Title VII had been passed pursuant to the power granted Congress under § 5 of the fourteenth amendment and stated:

> But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see Hans v. Louisiana, 134 U.S. 1 (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are unconditionally impermissible in other contexts. (footnote omitted) (emphasis added).

Id. at 2671.

Remarks in both the Senate and House indicate that Pub. L. No. 94-559 was also passed pursuant to § 5 of the fourteenth amendment, and § 2 of the thirteenth amendment. In the Senate, Senator Abourezk stated, "[i]n enacting this legislation we are acting pursuant to § 2 of the thirteenth amendment and § 5 of the fourteenth amendment." 122 Cong. Rec. 17052-053 (daily ed. Sept. 29, 1976). On the House floor, Representative Drinan made the same reference to the source of congressional power after referring to Bitzer.

> The question has been raised whether allowing fees against State governments in suits properly brought under the covered statutes would violate the 11th amendment. That

> amendment limits the power of the Federal courts to entertain actions against a State. This issue is no longer seriously in dispute after the recent Supreme Court decision in Fitzpatrick against Bitzer. Since this bill is enacted pursuant to the power of Congress under § 2 of the 13th amendment and § 5 of the 14th amendment, any question arising under the 11th amendment is resolved in favor of awarding fees against State defendants.

122 Cong. Rec. 12160 (daily ed. Oct. 1, 1976).

The House Committee on the Judiciary also referred to Bitzer. After indicating that government resources provide "an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities," H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 7 (1976), it was stated in a footnote: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. Fitzpatrick v. Bitzer, __U.S.__, 96 S. Ct. 2666 (June 28, 1976)." Id. at n.14. This same intention is evident in the Report of the Senate Committee on the Judiciary:

> Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, (footnote omitted) will be collected either directly from the official, in his official capacity (footnote omitted) from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976). On the Senate floor, an opponent of the bill, Senator Helms, recognized that the

bill would cover state and local government officials and proposed an amendment to exempt them.

> This legislation provides that State and local governments and their officials can be defendants in cases involving these statutes, and that attorneys' fees will "be collected either directly from the official in his official capacity, from funds of his agency or under his control, or from the State or local government." Presently this legislation potentially places a tremendous burden upon State and local governments. In other public interest law suits where the legal fees have been contested they have ranged from $200,000 to $800,000. Certainly, it is unwise to provide that liability in these amounts be assumed by already financially hard-pressed State and local governments.
>
> Therefore, the amendment I am about to call up would exempt State and local governments from the provisions of S.2278, or the Kennedy substitute.

122 Cong. Rec. 16432 (daily ed. Sept. 22, 1976). The amendment to exempt state and local governments was proposed and tabled. Id. at 16433-434. Finally, another obvious recognition that the new act will apply to actions against state officials is found in the House Report. After discussing the fact that various immunity doctrines often preclude an award of damages against public officials, it is stated:

> Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected.

H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 9 (1976).

Thus, the congressional intent concerning suits against state officials and the eleventh amendment could not be more clear. In

acting under §5 of the fourteenth amendment to provide attorneys' fees in §1983 cases, Congress attempted to assure that all persons equally would have the capacity to utilize §1983 to secure protection of the rights due them under federal law. There can be no doubt but that this new legislation governs the eleventh amendment issue in this case and precludes it as a defense of the state officials.

IV.

CONCLUSION

Based on Bradley, supra, and the express intent of Congress as outlined above, this Court must apply the provisions of Pub. L. No. 94-559 to this case. Having established this, the legislative history of the act and the decision in Bitzer, supra, dictate that the eleventh amendment defense raised by the state officials be rejected and that the decision of the lower court be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents.

Def 28

PETITIONERS' RESPONSE TO RESPONDENTS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

	Page:
Table of Authorities	ii
Argument	1
1. Civil Rights Attorney's Fee Award Act of 1976	1
A. There Have Been No Fourteenth Amendment Rights Raised In This Case	1
B. The Definition of "Person" Under 42 U.S.C. §1983 Has Not Been Amended to Include States	3
C. Congress Cannot Amend the Constitution by Statute	4
Conclusion	6

TABLE OF AUTHORITIES

Cases

	Page:
City of Kenosha v. Bruno, 412 U.S. 507 (1973)	4
Clark v. Washington, 366 F.2d 678 (9th Cir., 1966)	4
Employees of the Department of Public Health and Welfare v. Missouri, 411 U.S. 279 (1973)	5
Fitzpatrick v. Bitzer, 96 S.Ct.,2666 (1976)	2, 3, 4
Helvering v. Davis, 301 U.S. 619 (1937)	3
Jaso v. Tracszyk, 367 F. Supp. 434 (N.D. Ind., 1973)	4
King v. Smith, 392 U.S. 309 (1968)	3
Monroe v. Pape, 365 U.S. 167 (1961)	4
Townsend v. Swank, 404 U.S. 283 (1971)	3

Constitutional and Statutory Provisions

Article 1, §8 of the Constitution of the United States	3, 5
Eleventh Amendment to the Constitution of the United States	3, 5
Fourteenth Amendment to the Constitution of the United States	2
28 U.S.C. §1331	2
28 U.S.C. §1343(3)	2
28 U.S.C. §1343 (4)	2
28 U.S.C. §2201	2
28 U.S.C. §2202	2
42 U.S.C. §1396d(a)(4)(B)	3
42 U.S.C. §1983	1, 2, 3, 4
42 U.S.C. §2000e(a)	4
42 U.S.C. §2000e-5(k)	4

ARGUMENT

I

CIVIL RIGHTS ATTORNEY'S FEE AWARD ACT OF 1976.

A.

THERE HAVE BEEN NO FOURTEENTH AMENDMENT RIGHTS RAISED IN THIS CASE.

On June 1, 1976, this Court granted a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to decide the following question:

> Whether the Eleventh Amendment to the Constitution of the United States is an absolute bar to an award of attorney fees against officials of the State of Indiana when such an award is made against them in their official capacities.

After briefing by the parties, the Respondents filed their Supplemental Brief advising this Court of the passage by Congress of "The Civil Rights Attorney's Fees Awards Act of 1976" (hereafter the Act), which was signed into law by President Ford on October 19, 1976. Respondents contend that that statute is another reason why the opinions of the lower courts should be affirmed. Petitioners will show that the new act is not applicable to this case, and therefore, that the original question to be reviewed by this Court is still viable. The original position of the State is actually strengthened by the passage of the Act since it is an acknowledgement by Congress that there is no statutory authority for an award of attorney fees in §1983 litigation.

In Fitzpatrick v. Bitzer, 96 S Ct.2666 (1976) this Court held:

> . . we think that the Eleventh Amendment, and the principles of state sovereignty which it embodies, see Hans v Louisiana, 134 U.S. 1 (1890) are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See Edelman v Jordan, supra; Ford Motor Co. v Department of Treasury, supra (Emphasis supplied)

In affirming the award of attorney fees in Bitzer this Court did not grant blanket approval of all awards of attorney fees against States, but held only that such an award may be permissible when Congress legislates pursuant to §5 of the Fourteenth Amendment.

There has never been a Fourteenth Amendment issue raised in this case, nor were the decisions of the District Court and the Seventh Circuit based upon that Amendment. The original action was brought for a claim under 42 U.S.C. §1983 pursuant to 28 U.S.C. §§1343(3) and (4), for a claim pursuant to 28 U.S.C. §1331, and for declaratory relief pursuant to 28 U.S.C. §§2201 and 2202. Specifically, the allegations were that the State had not complied with provisions of the Social Security Act, 42 U.S.C. §1396d(a)(4)(B) and regulations promulgated thereunder in implementing a medicaid screening program.

While 42 U.S.C. §1983 is one of the statutes purportedly covered by the Act, it is important to realize that §1983 encompasses both constitutional and statutory rights. King v Smith 392 U.S. 309 (1968); Townsend v. Swank 404 U.S. 283 (1971). This case involves only statutory rights under §1983, and the only constitutional issues that could be involved would arise under the General Welfare Clause, Article 1, §8 of the Constitution of the United States. Helvering v. Davis, 301 U.S. 619 (1937).

Thus, since this is not a Fourteenth Amendment case, the Act is not applicable and the only issue involved is whether the Eleventh Amendment bars the award of attorney fees against State officials in their official capacities.

B.

THE DEFINITION OF "PERSON" UNDER 42 U.S.C. §1983 HAS NOT BEEN AMENDED TO INCLUDE STATES.

Although the State does not believe that the Act is applicable here, or that it should even be discussed since there has been no opportunity for the lower courts to rule on the statute after full briefing by the parties, the State would, nevertheless, make several additional comments on the Act.

The statute does not specifically include states pursuant to Fitzpatrick v. Bitzer, supra, and therefore, does not

act to permit fees in this case. In Bitzer the award of fees was made pursuant to an express statutory provision 42 U.S.C. §2000e-5(k), part of the statute that originally permitted the lawsuit. That section provides as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and United States shall be liable for costs the same as a private person.

That statute however, must be read in conjunction with another section of Title VII, 42 U.S.C. §2000e(a) which provides that the definition of "person" includes "governments, governmental agencies [and] political subdivisions."

Of critical importance here is the fact that the Act does not amend the definition of "person" found in 42 U.S.C. §1983 to cover states. It is well settled that states are not "persons" under §1983, Monroe v. Pape, 365 U.S. 167 (1961); City of Kenosha v. Bruno, 412 U.S. 507 (1973); Clark v. Washington, 366 F. 2d 678 (9th Cir., 1966); Jaso v. Tracszyk, 367 F. Supp. 434 (N.D. Ind., 1973), and therefore, are not subject to suit and an award of attorney fees pursuant to that statute. Thus, an attempt to pass a general amendatory statute to cover states in contravention of a Constitutional right, must fail.

C.

CONGRESS CANNOT AMEND THE CONSTITUTION BY STATUTE

By trying to make this Act apply to the case at bar, Respondents are actually saying that Congress can destroy a Constitutional provision by the enactment of any statute even when that statute does not have a constitutional provision as its basis. The State would emphatically assert that this position is untenable, and that the only way the Constitution may be altered is by amendment.

In Employees of the Department of Public Health and Welfare v. Missouri, 411 U.S. 279 (1973), this Court held that the Fair Labor Standards Act did not supersede the sovereign immunity of the State, holding at page 284:

> "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution. Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum."

Thus, it is equally true that the enactment of the Social Security Act pursuant to the "general welfare" clause of the Constitution, Art. 1, §8 would be on the same footing and cannot operate as a deprivation of the Eleventh Amendment defense granted to the states.

Even though the legislative history purports to have the Act apply retroactively this Court need not reach that question since the Act does not apply.

CONCLUSION

For these reasons, the Petitioners would assert that "The Civil Rights Attorney's Fees Awards Act of 1976" is not applicable to the issue before this Court, and therefore, the award of attorney fees against State officials in their official capacities must be reversed.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amicus curiae Lawyers' Committee for Civil Rights Under Law respectfully seeks leave to file the attached Brief in order to assist the Court in resolving an issue of critical importance—the power of a federal court to award attorneys' fees against state officials. The Lawyers' Committee's interest in this case stems from its longstanding concern with the problem of devising remedies that will secure the effective enforcement of federal civil rights laws, as more fully described in the "Interest of *Amicus Curiae*" section of the attached Brief. In this connection, the Lawyers' Committee has been especially concerned for a number of years with issues relating to the award of attorneys' fees in civil rights cases, and has filed briefs as *amicus curiae* in this Court in such cases as *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696 (1974); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); and *Fitzpatrick* v. *Bitzer*,

44 U.S.L.W. 5120 (U.S. June 28, 1976), as well as in various federal Courts of Appeals and state courts.

As of the time at which this Brief must be printed, *amicus* has received consent from the Respondents but has not yet been notified whether the Petitioner will consent to the filing of this Brief. (A copy of the Respondents' letter of consent has been filed with the Clerk of this Court).

WHEREFORE, *amicus* Lawyers' Committee for Civil Rights Under Law respectfully moves that its Brief be filed in this case.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Authorities	I
Interest of Amicus Curiae	1
Argument	3
Conclusion	11

TABLE OF AUTHORITIES

Cases

Allen v. *Illinois*, 397 U.S. 337 (1970)	9
Allen v. *State Board of Elections*, 393 U.S. 544 (1969)	6
Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975)	2, 8, 10
Amos v. *Sims*, 409 U.S. 942 (1972) aff'g 340 F. Supp. 691 (M.D. Ala. 1972)	10
Bond v. *Stanton*, 528 F.2d 688 (7th Cir. 1976)	10
Boston Chapter NAACP, Inc. v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975)	7
Bradley v. *School Board of Richmond*, 416 U.S. 696 (1974)	2
Chapman v. *Meier*, 420 U.S. 1 (1975)	6
Cherokee Nation v. *Oklahoma*, 397 U.S. 620 (1970)	7
Class v. *Norton*, 505 F.2d 123 (2d Cir. 1974)	7, 10
Connor v. *Williams*, 401 U.S. 549 (1972)	6
Edelman v. *Jordan*, 415 U.S. 662 (1974)	5, 7, 10
Epperson v. *Arkansas*, 393 U.S. 97 (1968)	6
Ex parte Young, 290 U.S. 123 (1908)	3, 4, 5, 11
Fairmont Creamery Co. v. *Minnesota*, 275 U.S. 70 (1927)	3, 6, 7, 8
Fitzpatrick v. *Bitzer*, 44 U.S.L.W. 5120 (U.S. June 28, 1976)	2, 8, 10
General Oil Co. v. *Crain*, 209 U.S. 211 (1908)	4
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975)	7
Hans v. *Louisiana*, 134 U.S. 1 (1890)	7

TABLE OF AUTHORITIES—Continued

	Page
Jenkins v. *Georgia*, 418 U.S. 153 (1974)	6
Jordan v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), cert. denied, 421 U.S. 991 (1975)	10
Keyes v. *School District No. 1*, 413 U.S. 189 (1973)	7
McClanahan v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973)	6-7
McCrary v. *Runyon*, 44 U.S.L.W. 5034 (U.S. June 25, 1976)	9
Milliken v. *Bradley*, 418 U.S. 717 (1974)	7
National Hockey League v. *Metropolitan Hockey Club, Inc.*, 44 U.S.L.W. 3754 (U.S. June 30, 1976)	10
Skehan v. *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), vacated, 421 U.S. 983 (1975)	10
Souza v. *Travisono*, 512 F.2d 1137 (1st Cir.), vacated, 423 U.S. 809 (1975)	10
Spence v. *Washington*, 418 U.S. 405 (1974)	6
Thonen v. *Jenkins*, 517 F.2d 3 (4th Cir. 1975)	10

Constitution and Statutes

United States Constitution:

Article III	6, 7
Eleventh Amendment	4, 5

United States Code:

5 Stat. 518	8
10 Stat. 161	8
28 U.S.C. 1920	8
28 U.S.C. 1923	8

Federal Rules of Appellate Procedure

Rule 38	9

Federal Rules of Civil Procedure

Rule 37(a)(4)	9
Rule 37(c)	9

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
C. Wright, Handbook of the Law of Federal Courts (2d Ed. 1970)	4
Note, Attorneys' Fees and the Eleventh Amendment, 88 HARV.L.REV. 1875 (1975)	7

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---

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States, John F. Kennedy, to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, fourteen past Presidents of the American Bar Association, two former Solicitors General, a number of law

school deans, and many of the nation's leading lawyers. Through its national office in Washington, D.C. and its offices in Jackson, Mississippi and eleven other cities, the Lawyers' Committee over the past thirteen years has enlisted the services of over a thousand members of the private Bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, and the administration of justice.

The primary objective of the Lawyers' Committee is to help develop the legal resources necessary to enforce fully the civil rights of minorities and the poor. Through the efforts of the Lawyers' Committee and similar groups, a great deal of high-quality legal service has been provided by the volunteer activities of the private Bar. However, the experience of the Lawyers' Committee over the past decade compels the conclusion that these valuable but limited legal resources are inadequate by themselves to effectuate fully the basic civil rights created by Congress and embodied in the Constitution.

Accordingly, we have participated as *amicus curiae* in recent cases in this Court concerning awards of counsel fees in civil rights litigation, *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696 (1974); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *Fitzpatrick* v. *Bitzer*, 44 U.S.L.W. 5120 (U.S. June 28, 1976), because we have concluded that such awards are essential elements of the relief appropriate for those who have vindicated federal rights which depend in large measure upon private enforcement. Such awards also serve other essential functions in cases such as the one at bar, for they make available to federal judges an appropriate sanction in controlling the conduct of litigants and they provide an effective deterrent to others who would litigate in an unacceptable manner.

In the instant case the petitioners, who are state officials, do not challenge (and do not raise any question concerning) the finding that they acted in bad faith and that the attorneys' fees awarded by the courts below are therefore appropriate under established equitable principles. In these circumstances the only question is whether state officials who have in fact litigated in bad faith are nonetheless immune to an award of attorneys' fees which would concededly be proper against any other litigant.

The Lawyers' Committee litigates a variety of civil rights cases against state governments and their officials. To permit state officials who litigate in bad faith to clothe themselves with this kind of immunity will have a pernicious effect on our efforts to require state governments to live up to their legal and Constitutional obligations. *Amicus* therefore has a vital interest in this matter and in urging this Court to affirm the award of attorneys' fees.

ARGUMENT

Petitioners do not argue that federal courts lack power to grant attorneys' fees as costs against parties in general who are guilty of litigating in bad faith. Rather, petitioners' sole challenge is that, as state officials, they alone are not subject to such costs. That argument is foreclosed by this Court's decisions in *Ex parte Young*, 290 U.S. 123 (1908), and *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927), two cases not cited by the petitioners.

Analysis of the petitioners' defenses here must begin with *Ex parte Young*, for it is that case which gives rise to the respondents' right to bring this suit against state officials. The doctrine that state officers are suable, established by *Ex parte Young*, has been called "indispensable to the establishment of constitutional govern-

ment and the rule of law." C. Wright, *Handbook of the Law of Federal Courts* 186 (2d ed. 1970). That doctrine is a fundamental mechanism for enforcing federal rights and protecting citizens from violations of their federal rights committed in the name of their state government. As this Court said in *General Oil Co.* v. *Crain*, 209 U.S. 211, 226 (1908), decided the same day as *Ex parte Young*:

> Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power to review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; . . . .[1]

The doctrine of *Ex parte Young*, and the remedies available once state officials are properly before the federal courts, are not unlimited. Two years ago this Court defined a major boundary when it held that back payments of welfare benefits could not be required of the states—no matter whether such payments were called

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[1] Nor did the Court regard this as a fanciful possibility, for it was fully aware that government officials may misuse their power even where they do not deliberately set out to interfere with constitutional rights:

> Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. *See* Ex parte Young, where this subject is fully discussed and the cases reviewed.

209 U.S. at 227.

damages or equitable restitution. *Edelman* v. *Jordan*, 415 U.S. 662 (1974).

Edelman acknowledges that the difference between relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* is often subtle, 415 U.S. at 667. While characterizing the Eleventh Amendment as a protection of the state treasury from potentially ruinous money awards, *Edelman* recognizes that many forms of equitable relief have great fiscal impact on state treasuries; but such an "ancillary effect" is a "permissible consequence" of *Ex parte Young*. 415 U.S. at 668. *Edelman* essentially draws the line between "a monetary loss resulting from a past breach of legal duty on the part of the defendant state officials" (direct effect), and payments which are a necessary consequence of the suit itself (ancillary effect). 415 U.S. at 668.

The distinction is decisive in this case. The normal incidents and consequences of a federal court action—e.g., filing costs, witness fees, and properly awarded attorneys' fees—are ancillary in nature. Such incidents of litigation are not in the nature of actions on preexisting state debts; they are not "a monetary loss resulting from a past breach of legal duty." They do not derive from the prior conduct of the state or its officials which gave rise to the underlying cause of action. They are not designed to compensate, nor to provide reparations for, the victims of unlawful conduct. Except for the fact that such costs of litigating also involve dollars, there is *no* resemblance to the "award of damages against the State" which is forbidden by *Edelman*. 415 U.S. at 668.

Rather, the attorneys' fees at issue here are an incidental expense of the litigation itself and, as such, are within a court's *inherent* power to control the litigation before it. That power was affirmed a half century ago

in *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927). In that case, Minnesota made the explicit claim that, as a sovereign state, it could not be taxed with the prevailing party's costs of suit. This Court held that a state can be made to bear the expenses of proceedings in federal court:

> But is the state to be regarded as the sovereign here? This court is not a court created by the state of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this court loses some of its character as such.

275 U.S. at 74. The practice of taxing costs against states in the same way as against other litigants has been invariable and has continued to this day.[2]

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[2] *Amicus* State of California (though not the petitioners) attempts to limit *Fairmont Creamery* on the ground that the case began as a criminal prosecution brought by the State of Minnesota. But this Court made it clear that no such limitation was intended, and that the power to tax costs against any litigant attaches in all cases properly within the Article III jurisdiction of a court of the United States. Thus, the Court "treat[ed] the state just as any other litigant, and impos[ed] costs on it as such," 275 U.S. at 77; and it referred to 129 cases, dating back to 1860, which show that "the invariable practice has been when the judgment has been against a state in both civil and criminal cases to adjudge costs against it." *Id.*

The Court has continued to apply the *Fairmont Creamery* rule, without distinction, to tax costs against states, state agencies, and state officials; in cases coming up from the federal courts and from the state courts; and in cases where the states are plaintiffs and in cases where the states are defendants. *See, e.g.*, the judgments in *Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Spence* v. *Washington*, 418 U.S. 405 (1974); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Connor* v. *Williams*, 401 U.S. 549 (1972); *Chapman* v. *Meier*, 420 U.S. 1 (1975); *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cherokee Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

The attorneys' fee issue in this case is settled by the decision in *Fairmont Creamery* because such fees are costs of litigation. They are "incidents of the hearing," which "attach to the regular jurisdiction" of a court of the United States under Article III of the Constitution. 275 U.S. at 77.

The equivalence of costs and fees is established by function and tradition. Both are closely related to a court's power and obligation to manage the litigation before it. And their amount varies with the nature, length and complexity of the litigation itself.[3]

In keeping with their functional equivalence, fees have traditionally been regarded by Congress as in the nature

The question has been raised again recently, and the rule of *Fairmont Creamery* reiterated by two courts of appeals. *Boston Chapter NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1974).

[3] A recurring theme of the state immunity cases has been concern about the potentially ruinous effect unregulated monetary awards might have upon state treasuries. This concern was most acute in cases like *Hans* v. *Louisiana*, 134 U.S. 1 (1890), involving the size of the state's debt, but it was also alluded to in *Edelman* v. *Jordan*, 415 U.S. 662, 665-66 (1974). In this respect, while an attorneys' fee award will ordinarily be larger than the other costs taxed in a given case, both are invariably so limited that neither could disrupt a state treasury. Indeed, most attorneys' fee awards are miniscule compared with the dollar expense of complying with an injunction. Moreover, many cases involve other taxable costs which are larger than most attorneys' fee awards. *Compare* the $2,366 attorneys' fee granted in this case with the costs awarded *in this Court alone* in such cases as *Milliken* v. *Bradley*, 418 U.S. 717 (1974) ($20,329.60); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973) ($28,905.48). *See also* the listing of attorneys' fees involved in other cases involving state officials in Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1896 n.126 (1975).

of costs.[4] For example, attorneys' fees have been included among those costs regulated by general cost statutes, such as the Act of August 23, 1842, which gave this Court power (5 Stat. 518):

> to make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits, to the parties, their attorneys, solicitors, and proctors, to the clerk of the court, to the marshal of the district, and his deputies, and other persons serving processes, to witnesses, and to all other persons whose services are usually taxable in bills of costs.

The same pattern was followed in 1853 when Congress itself undertook to set attorneys' fees (10 Stat. 161), and has continued to the present in the form of 28 U.S.C. §§ 1920 and 1923. Under these provisions, attorneys' fees are retained as taxable costs.

The virtual identity of fees and other items of costs was recognized in an *amicus* brief filed by Indiana (petitioners here) and 19 other states in *Fitzpatrick* v. *Bitzer*, 44 U.S.L.W. 5120 (U.S. June 28, 1976): "Costs taxed against the state, however minimal, nevertheless are paid from the state treasury, as are attorneys' fees awarded against the state." Brief of the Commonwealths of Pennsylvania and Virginia, et al., as *amici curiae* in No. 75-283, at p. 25. From this, these state *amici* concluded flatly that "*Fairmont Creamery* should be explicitly overruled." *Id.* We agree with these state *amici* (in *Fitzpatrick*) that the attorneys' fee award cannot be reversed unless this Court is to overrule *Fairmont Creamery* and leave states and state officials—unlike any other

[4] It is true that the general American rule treats attorneys' fees as a cost which is not ordinarily taxable, but as this Court only recently reiterated, that is a matter of statute or equitable discretion, *not* a matter of constitutional power. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 270-71 (1975).

party—immune from such routine litigation expenses as the costs of filing, service of process, court transcripts, discovery sanctions, appeal bonds, and proceedings before special masters. Nothing in the Constitution, our federal system, or an unbroken century of judicial practice commands such an anomalous result.

In no situation are the foregoing principles more apt than where parties—in this case state officials represented by state lawyers—have been guilty of bad faith litigation. Courts have traditionally exercised their "inherent power" to control litigation by awarding attorneys' fees against those who have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *McCrary* v. *Runyon*, 44 U.S.L.W. 5034, 5041 (U.S. June 25, 1976). Without the power to control such behavior, the courts are degraded and their constitutional function is severely eroded. *Cf. Allen* v. *Illinois*, 397 U.S. 337, 347 (1970).

The State of California, *amicus* herein, recognizes the anomaly of depriving federal courts of the power to regulate litigants' behavior, and advances the startling proposal that in injunctive suits the courts' only regulatory device is the contempt power. *Amicus* Brief, pp. 10-11. A more intrusive remedy could hardly be imagined, yet California is correct in saying that contempt citations are the only alternative. While we agree that courts do have the power to issue contempt citations to those, even state officials, who litigate in "bad faith, vexatiously, wantonly, or for oppressive reasons," we also believe that the range of sanctions and deterrents available to federal judges should not be limited to the one which they, understandably, are most reluctant to invoke against state officials.[5] Having the contempt power, it follows *a fortiori*

[5] If petitioners' position is accepted, then of course it would be unconstitutional to apply to state officials the provisions of Rules 37(a)(4) and 37(c), Fed. R. Civ. P., or Rule 38, F.R. App. P., *i.e.*, no attorneys' fees could be imposed for willful failure to make

that federal courts have the lesser power to award attorneys' fees in cases, like this, of undisputed bad faith litigation.

The availability of fees against state officials who litigate in bad faith has been affirmed by this Court as recently as four years ago. *Amos* v. *Sims*, 409 U.S. 942 (1972), *aff'g* 340 F. Supp. 691 (M.D. Ala. 1972). In that case, the district court, having found bad faith in the long failure to reapportion, awarded attorneys' fees against state officials who included the Governor, Attorney General and Secretary of State. On appeal to this Court, those officials argued that such an award was "tantamount to the award of a money judgment against the State of Alabama in direct violation of the doctrine of sovereign immunity." Jurisdictional Statement, p. 17. This Court summarily affirmed, in a decision to which it referred in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 270 n.46 (1975).[6]

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discovery or willful failure to admit, nor could damages and single or double costs be taxed for taking a frivolous appeal. This Court, however, has only recently emphasized the need for a broad range of sanctions, "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 44 U.S.L.W. 3754, 3755 (U.S. June 30, 1976).

[6] Since *Edelman*, four circuits have upheld awards of attorneys' fees against state officials. *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1975); *Souza* v. *Travisono*, 512 F.2d 1137 (1st Cir. 1975), *vacated*, 423 U.S. 809 (1975); *Thonen* v. *Jenkins*, 517 F.2d 3 (4th Cir. 1975); *Bond* v. *Stanton*, 528 F.2d 688 (7th Cir. 1976) (the instant case). *See also Fitzpatrick* v. *Bitzer*, *supra*.

Two circuits, however, have found such fee awards indistinguishable from the retroactive welfare payments condemned in *Edelman*. *Skehan* v. *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975); *Jordon* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). The two courts which have denied attorneys' fees against state officials in reliance on *Edelman* have focused only on the fact that money is to be paid from the state treasury, and have ignored the distinction between direct and ancillary effects on state treasuries.

The petitioners here approach this Court, after entry of judgment against them and after undisputed findings that they litigated in bad faith, and assert that the most fundamental rules, applicable in their nature to all litigants, cannot touch them. Acceptance of their argument would destroy the meaning of *Ex parte Young*, hasten the erosion of the rights of the people of this Nation, and deprive the federal courts of a relatively mild but effective deterrent against bad faith litigation.

CONCLUSION

The lower courts' orders awarding attorneys' fees should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1413

* * *

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners

V.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association; individually and on behalf of all others similarly situated,

Respondents

* * *

BRIEF OF AMICUS CURIAE, THE STATE OF TEXAS

* * *

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TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

QUESTION PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 5

CERTIFICATE OF SERVICE 6

INDEX OF AUTHORITIES

Cases — Page

Alyeska Pipeline Service Co. v. Wilderness Society, 95 S.Ct. 1612 (1975) 5

Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976) 1,2

Edelman v. Jordan, 415 U.S. 651 (1974) 3,4

Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973) 3

Fitzpatrick v. Bitzer, 96 S.Ct. 2666 (1976) 4

Ford Motor Company v. Department of Treasury, 323 U.S. 459 (1945) 3,4

CONSTITUTIONAL AND STATUTORY PROVISIONS

	Page
Eleventh Amendment to the Constitution of the United States	2,3,4
Fourteenth Amendment to the Constitution of the United States	4
Title 42 U.S.C. §1983	2,3,4,5

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* * *

BRIEF OF AMICUS CURIAE, THE STATE OF TEXAS

* * *

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) has been reported as *Bond v. Stanton*, 528 F.2d 688 (7th Cir. 1976), and a copy of it is appended to the Petition for

Writ of Certiorari at page A-1. The Order of the United States District Court for the Northern District of Indiana in *Bond v. Stanton* is appended to the Petition for Writ of Certiorari at page A-8.

In addition, Orders of the Seventh Circuit dated June 3, 1975, and February 19, 1976, denying applications for attorneys' fees have been appended to the Petition for Writ of Certiorari at pages A-11 and A-13, respectively.

JURISDICTION

The jurisdictional statement in the Petition for Writ of Certiorari is proper and is incorporated herein.

In addition, the State of Texas files this Amicus Curiae Brief in support of Petitioners because of the serious nature of the issues presented for review and a vital interest in them.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions for consideration herein are the Eleventh Amendment to the Constitution of the United States and Title 42 U.S.C. §1983. The text of both are found in the Petition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

Whether there is a bar to the award of attorneys' fees in an action commenced under 42 U.S.C. §1983 and the award is made against officials of the State of Indiana in their official capacities.

STATEMENT OF THE CASE

The statement of the case is fully and properly set out in the Petition for Writ of Certiorari beginning at page 3.

ARGUMENT

The real issue to be decided here is whether an award of attorneys' fees, in §1983 litigation, against state officers, acting in their official capacities, will be allowed to stand. The resolution of that issue is of monumental importance. A decision adverse to Petitioners would have to be viewed as further and perhaps even total diminution of the Eleventh Amendment to the United States Constitution.

Very simply put, the recovery of monies from a sovereign state, with a total absence of statutory or constitutional authorization, either by way of damages or attorneys' fees, is constitutionally impermissible. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973).

Moreover, the Petitioners in this cause, the Administrator of the Indiana State Department of Public Welfare and the Board Members of the State Board of Public Welfare, are immune from having a judgment for attorneys' fees entered against them. *Edelman v. Jordan, supra* at 664, 665, 675 and 676. The Court observed in *Edelman* at page 664, citing *Ford Motor Company v. Department of Treasury*, 323 U.S. 459 (1945):

> "[W]hen the act is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

There can be no doubt as to applicability of the *Ford Motor Company* rationale in a suit such as this where Petitioners were sued and an award made against them in their official capacities. The State of Indiana is the

real party of interest.

Furthermore, this Court's recent opinion in *Fitzpatrick v. Bitzer*, 96 S.Ct 2666(1976) makes it clear that an award of attorneys' fees against a sovereign state is only permissible if there is "express congressional authority" for such an award. In relating the basis for the decision in *Bitzer*, the Court said;

> "When Congress acts pursuant to §5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of the constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states, or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan, supra; Ford Motor Co. v. Dept. of Treasury, supra.*" Id. at 2671.

This litigation was brought under 42 U.S.C. §1983, and clearly, there is no Congressional authorization for departure from the mandatory language of the Eleventh Amendment. The State of Indiana is entitled to invoke its Eleventh Amendment immunity.

The Eleventh Amendment prohibition to the award discussed above is absolute and extends to the situation where "bad faith" is attributable to the state. Such a course must be followed where the action complained of is, as in this litigation, clearly state action. If not, legislative bodies of all fifty states now must face the added burden of monetary liability for even the most

insignificant statutory provision based on the very tenuous and undefinable standard of the motive behind passage. How is one to determine the rationale behind passage of such legislation? Such a development will certainly mark a new era in jurisprudence and will likely cause great strain in the delicate relationship known as federalism.

Finally, awards of attorneys' fees in the absence of congressional authorization for wanton, vexatious and oppressive action, as an exception to the traditional American rule [*Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S.Ct. 1612 (1975)], against a sovereign state were never contemplated. If such a result is forth coming, does that mean that the states can similarly recover for those multitudinous §1983 lawsuits shown to be frivolous and merely filed in bad faith? No lesser position should be afforded the states if the result reached below is sanctioned by this court.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the _____ day of August, 1976, three copies of the foregoing Brief of Amicus Curiae, The State of Texas, were mailed by certified mail, return receipt requested, to each of the following persons: Seymour Moskowitz, Project Justice and Equality, 1109 N. Union Street, Gary, Indiana 46402; Lawrence Albrecht, 1322 S. 16th Street, Milwaukee, Wisconsin 53204; Ivan E. Bodensteiner & Wayne Defferding, Valparaiso University School of Law, Valparaiso, Indiana 46383; John P. Segovia, 800 Massachusetts Street, Gary, Indiana 46402; Donald Bowgard, 219 State House, Indianapolis, Indiana 46204.

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TABLE OF CONTENTS

	PAGE
MOTION TO FILE AMICUS CURIAE BRIEF	iii
INTEREST OF THE AMICUS	1
ARGUMENT:	
No Award Of Attorney's Fees Is Appropriate Under 42 U.S.C. § 1983 In The Absence Of Statutory Authorization	2
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

Aleyska Pipeline Service Co. v. The Wilderness Society, et al., 421 U.S. 420, 44 L.Ed. 2d 141, 95 S.Ct. 1612 (1975) 2

Fitzpatrick v Bitzer, ... U.S. ....., 49 L.Ed. 2d 614, 96 S.Ct. 2666 (1976) 7, 8, 10

Edelman v. Jordan, 415 U.S. 651, 39 L.Ed. 2d 662, 94 S.Ct. 1347 (1974) 7, 13

Jagnandan v. Giles, President of Mississippi State University, 538 F.2d 1166 (September 20, 1976) .. 8, 9, 10

Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y.) appeal sub.nom., Rabinovitch v. Nyquist, 45 U.S.L.W. 3007 (No. 75-1809) 8, 9, 10

Skehan v. Board of Trustees of Bloomsburg State College, 538 F. 2d 53 (CA 3, 1976) (U.S.S.C. No. 76-409, Petition Pending); prior appeal, 501 F. 2d 31 ..... 10, 11

Vaughn v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 838 (1962) 11

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975) 12

Constitutional Provisions

Eleventh Amendment to the Constitution of the United States 8

Statutes

42 U.S.C. § 1983 6

42 U.S.C. § 2000-5 (k) 7

Other Authorities

S. 2278, "The Civil Rights Attorney's Fees Awards Act of 1976" 2, 8

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) 3, 4, 5

H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) .. 5, 6, 8

H. R. 15460, "The Civil Rights Attorney's Fees Awards Act of 1976" 6

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Respondents.

MOTION TO FILE AMICUS CURIAE BRIEF

NOW COMES the State of Illinois by William J. Scott, Attorney General for the State of Illinois and respectfully moves this Honorable Court for leave to file the Brief of the State of Illinois, *Amicus Curiae*. In support of this Motion, it is averred that the subject matter of the appeal at bar is of immediate and vital consequence to your *Amicus*; That your *Amicus* was not advised of the pendency of this cause until a date subsequent to the

time when leave was not required herein; That the Brief of your *Amicus* submits certain Congressional references and other critical authorities not available at that prior date; That your *Amicus* believes that these additional references will be of assistance to this Honorable Court and all parties hereto.

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Subscribed and sworn to before me
this 26th day of October, 1976.
My Commission expires 11-27-77.

_____
Notary Public

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1413

WAYNE A. STANTON, individually and in his capacity as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, ROBERT M. CURLESS, ARVELLA M. STANTON, ROBERT G. WATSON, JR., JAMES W. BURNETT, JR., individually and in their capacity as members of the State Board of Public Welfare,

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, NEW DAY WELFARE ORGANIZATION, an unincorporated association;
SARA JUDE, as President, GARY AFDC MOTHERS' ORGANIZATION WELFARE RIGHTS ORGANIZATION, an unincorporated association;
NORMA JEAN MOORE, as President, EAST CHICAGO WELFARE RIGHTS ORGANIZATION, an unincorporated association, individually and on behalf of all others similarly situated,

Respondents.

BRIEF OF THE STATE OF ILLINOIS AMICUS CURIAE

INTEREST OF THE AMICUS

The decision of this Honorable Court in the appeal at bar will have an immediate impact on each of our fifty states. Your *Amicus*, the State of Illinois, is vitally concerned that the integrity of the Eleventh Amendment to the Constitution of the United States be maintained. Toward this objective your *Amicus* respectfully submits its brief.

ARGUMENT

NO AWARD OF ATTORNEY'S FEES IS APPROPRIATE UNDER 42 U.S.C. § 1983 IN THE ABSENCE OF STATUTORY AUTHORIZATION.

On May 12, 1975, this Court rendered its noted decision in *Alyeska Pipeline Service Co. v. The Wilderness Society, et al.*, 421 U.S. 420, 44 L.Ed.2d 141, 95 S.Ct. 1612. In the Opinion delivered by Mr. Justice White, it was held that:

> Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others. But it would be difficult, indeed, for the courts, without legislative guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former. If the statutory limitation of right-of-way widths involved in this case is a matter of the gravest importance, it would appear that a wide range of statutes would arguably satisfy the criterion of public importance and justify an award of attorneys' fees to the private litigant. And, if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 USC § 1983 [42 USCS § 1983] seeking to vindicate *constitutional* rights?

On September 29, 1976, the United States Senate passed Bill S. 2278, "The Civil Rights Attorney's Fees Awards Act of 1976." 122 Cong. Rec. S. 17053 (daily ed., September 29, 1976). On October 1, 1976 it was passed by the United States House of Representatives, and is now pending Presidential approval. This Bill provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Civil Rights Attorney's Fees Awards Act of 1976."

SEC. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

(*id.*, 122 Cong. Rec. S 17053)

In S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), the Committee on the Judiciary stated the purpose of this Bill:

> This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and to achieve consistency in our civil rights laws. (*id.* at p. 1)

The Committee further stated that:

> . . . in *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the

"private attorney general" theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization. This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights. Likewise, fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.

> This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.

(*Id.*, S. Rep. No. 94-1011 at p. 4)

Respecting its power to authorize awards of attorney's fees, the Report declared that this was done ". . . in cases covered by S. 2278 in accordance with Congress' powers under, *inter alia*, The Fourteenth Amendment, Section 5." (*id.*, S. Rep. No. 94-1011 at p. 5)

With respect to the scope of this authorization, the Report noted that:

> . . . defendants in these cases are often State, or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

(*id.*, S. Rep. 94-1011 at p. 5, footnotes omitted)

Thus, this pending legislation directly bears on the appeal at bar.

In the decision below, it was held that:

> This appeal presents the question of whether the eleventh amendment bars the assessment of attorney's fees against state officials sued in their official capacity under 42 U.S.C. § 1983, (*Bond v. Stanton*, 528 F.2d 688, 689 (1976)) [Emphasis added]

In the Judiciary Committee Report on Senate Bill 2278, it was expressly noted that attorney's:

> . . . fees are allowed in a suit under Title II of the 1964 Civil Rights act challenging discrimination on a private restrainment, but NOT [allowed] in suits under 42 U.S.C. §1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws. (*id.*, S. Rep. No. 94-1011, at P. 4 emphasis added)

Similarly, in H. R. Rep. No. 94-1558, it was observed that:

> Section 1983 is utilized to challenge official discrimination, such as racial segregation imposed by law. *Brown v. Board of Education*, 347 U.S. 483 (1954). It is ironic that, in the landmark *Brown* case challenging school segregation, the plaintiffs could not recover their attorney's fees, despite the significance of the ruling to eliminate officially imposed segregation.
>
> * * *

> . . . The Civil Rights Attorney's Fees Awards Act of 1976, would amend Section 722 (42 U.S.C. 1988) allow the award of fees in certain Civil Rights cases. It would apply to actions brought under . . . Section 1983 . . . (*id.*, at pp. 4-5).

This House Report was submitted by the Committee on the Judiciary concerning H.R. 15460, which proposed an amendment nearly identical to that of the Senate, as follows:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs. (*id.*, H.R. Rep. 94-1558 at p. 11)

After adoption of this amendment, the House Report concluded that:

> The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.
>
> * * *
>
> Of course, the 11th Amendment is not a bar to awarding of counsel fees against state governments. *Fitzpatrick v. Bitzer*, ... US ....., 96 S.Ct. 2666 (June 28, 1976).
>
> (*id.*, H.R. Rep. 94-1558 at p. 7.)

Thus, the explicit provisions of § 1983 are understood as presently containing NO consent to award of attorneys fees. This was the conclusion of both Committees on the Judiciary in the United States Senate and House of Representatives. For precisely that reason, § 1983 was expressly included in both Senate Bill 2278 and House Bill 15460. Without such inclusion, and until approval by the President, it is *in*appropriate to award such fees under § 1983.

The decision of this Court in *Fitzpatrick v. Bitzer*, ... U.S. ....., 49 L.Ed.2d 614, 96 S.Ct. 2666 (June 28, 1976) also addresses this "threshhold fact of Congressional authorization." In *Fitzpatrick*, the ". . . District Court held that the Connecticut State Employees Retirement Act violated Title VII's prohibition against sex-based employment discrimination." (*id.*, 49 L.Ed.2d 614, at 618). Title 42 U.S.C. § 2000e-5(k) provides that:

> In any action or proceeding under this subchapter [Title VII of the Civil Rights Act of 1964] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Based upon this express Congressional authorization, this Court held in *Fitzpatrick, supra*, that:

> We think that Congress may, in determining what is "appropriate legislation for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are consitutionally impermissible in other contexts [under the Eleventh Amendment]. See *Edelman v. Jordan, supra; Ford Motor Co. v. Department of Treasury, supra* (id., Fitzpatrick, 49 L.Ed.2d at 622)

In contrast, the Opinion rendered by Mr. Justice Rehnquist in *Fitzpatrick, supra*, also explains that in *Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974):

> The Civil Rights Act of 1871, *42 USC § 1983* [42 USCS § 1983], had been held in Monroe v. Pope, 365 US 167, 187-191, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961) to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendants. The provisions of the Social Security Act relied upon by plaintiffs [*in Edelman*] were held by their terms not to "authorize suit

against anyone" 415 US, at 674, 39 L.Ed.2d 662, 94 S.Ct. 1347, and they, too, were incapable of supplying the predicate for a claim of waiver [of the 11th Amendment] on the part of the State, (*id.*, *Fitzpatrick*, 49 L.Ed.2d at 619)

Thus, the Reports of the Committees on the Judiciary for the United States Senate and House are consistent with the decision of this Court in *Fitzpatrick, supra.* The ". . . Eleventh Amendment, and the principle of State Sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." (*Fitzpatrick, supra,* 49 L.Ed.2d 614 at 62). When and if § 1983 is amended under the "plenary" authority of the Fourteenth Amendment to permit award of attorney's fees, the Eleventh Amendment will *then* be a bar.

Two other recent decisions by the Third and Fifth Circuit Courts of Appeals also require this same conclusion. On September 20, 1976, the Fifth Circuit rendered its decision in *Jagnandan v. Giles, President of Mississippi State University,* 538 F.2d 1116 (September 20, 1976)

In that case, it was found below that the State of Mississippi had enacted a statute requiring payments of higher out-of-state tuition rates by all aliens residing in Mississippi. This statute was held unconstitutional. (379 F.Supp. 1178) However, the three-judge district court declined to award payment of the excess tuition to the prevailing aliens. Instead, it followed the decision of this Court in *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

On appeal, the *Jagnandan* Court of Appeals affirmed. In doing so, the impact of both *Fitzpatrick v. Bitzer,* 49 L.Ed.2d 614, *supra,* and *Manclet v. Nyquist,* 406 F.Supp. 1233 (W.D.N.Y.), appeal *sub nom. Rabinovitch v. Nyquist,* 45 U.S.L.W. 3007 (U.S. July 13, 1976) (No. 75-1809) was considered at length.

In the *Jagnandan* Court's examination of *Rabinovitch, supra,* it was noted that the specific issue is:

> Does Fourteenth Amendment, of its own force, constitute limitation on sovereign immunity bar of Eleventh Amendment so that, even absent specific statutory declaration authorizing money judgment against state in suit brought to enforce Fourteenth Amendment rights, federal court may enter judgment awarding money damages against state where, in its discretion, such relief is necessary and appropriate to fully vindicate constitutional rights and to deter future violations of constitutional proscriptions?
> (45 U.S.L.W. 3007) (U.S. July 13, 1976). (Cited in ftn. 46, 538 F.2d at 1185)

Addressing this issue in a concurring opinion, Circuit Judge Goldberg asserted that:

> The Congress cannot realistically be expected to provide fully adequate remedies for every fourteenth amendment violation, because such violation often reflect the type of overreaching that tempts all governments . . .
>
> Although it is clearly appropriate for the federal sovereign to muscularize the potency of the fourteenth amendment through selective repeal of the eleventh amendment, *see Fitzpatrick v. Bitzer, supra,* primacy of individual rights requires more than section 5 for full and lasting effectuation. Absent strong countervailing indications from Supreme Court cases, I would hold that in situations like the one before us, the fourteenth amendment of its own force has acted to repeal the eleventh amendment *pro tanto.*
>
> * * *
>
> This most important issue may be frontally addressed and authoritatively resolved in *Rabinovitch* or in some other case in the near future. The question certainly merits direct and definitive Supreme Court attention. Through this concurring opinion, I sound a note of supplication that the

> Court might consider the wisdom of rejecting the implications of *Edelman* that we have found controlling, and of holding that the eleventh amendment has been modified to the extent necessary fully to effectuate the sweeping mandate of the fourteenth amendment. (*id.*, 538 F.2d at 11, 1189-1190)

Despite this perspective of *Rabinovitch*, the *Jagnandan* Court held that the decision in *Fitzpatrick v. Bitzer* could not be controlling. It found that:

> Different from the case at bar was the presence in *Fitzpatrick* of federal legislation authorizing federal courts, under Title VII, to award money damages in favor of private individuals and against a state found to have discriminated in employment on the basis of race, religion, color, sex or national origin. ___ U.S. at ___, 96 S.Ct. 2666. *See* 42 U.S.C.A. § 2000e-2(a). This legislation had been passed pursuant to § 5 of the Fourteenth Amendment. Similarly in *Edelman* there was no express congressional legislation. Thus *Fitzpatrick* found a situation wholly unpresent in *Edelman*. The Court in *Fitzpatrick* indicated that without this particular legislation the case would be governed by *Edelman*. (*id.*, *Jagnandan*, 538 F.2d at 1180)

Consequently, the court concluded:

> No enforcing legislation is involved in the instant case. The very fact that the *Fitzpatrick* Court relied on legislation, authorized by the enabling section of the Fourteenth Amendment, supports the necessity of such legislation for recovery of money from the state by a person whose Fourteenth Amendment rights have been violated. Authority cited by the Court in *Fitzpatrick* mandates this requirement. *See Ex parte Virginia*, 100 U.S. (10 Otto.) 339, 347, 25 L.Ed. 676 (1880) . . . Absent further direction from the Supreme Court, and where no section 5 legislation has been passed, our holding here is in keeping with this historical balance placed upon a coterminous recognition of the Eleventh and Fourteenth Amendments. (*id.*, *Jagnandan*, 538 F.2d at 1185)

In addition to *Jagnandan*, a second illuminating decision has been recently rendered by the Third Circuit after remand in *Skehan v. Board of Trustees of Bloomsburg St. College*, 538 F.2d 53 (CA 3, 1976) (U.S.S.C. No. 76-409, Petition Pending). In *Skehan*, it was found that the plaintiff was a non-tenured Associate Professor of Economics at Bloomsburg State College in Pennsylvania. After termination by the college, Skehan initiated an action under 42 U.S.C. § 1983, seeking reinstatement, back pay, punitive damages and attorney's fees. On Appeal, the Court of Appeals held Skehan to be a private attorney general. It instructed the District Court to consider an award of back pay and attorney's fees if the college did not possess sovereign immunity. (*Skehan v. Board of Trustees*, 501 F.2d 31, CA 3, 1974). On appeal by Skehan to this Court, the cause was remanded for further consideration in light of the *Alyeska Pipeline* decision, *supra*. In its decision after remand, the Court of Appeals observed that:

> Skehan also urges that on remand he would be able to show that all of the defendants, but in particular President Nossen, acted in bad faith, vexatiously, wantonly, or for oppressive reasons, states of mind which Skehan contends permit an award of attorney's fees under the American rule. The particular reference to Nossen, a prime mover in his termination but hardly a prime mover in carrying on this litigation, suggests the need for distinguishing between the bad faith which may have led to the termination of employment and bad faith, vexatiousness or oppression in litigating. It is the latter which comprises the predicate for the well-recognized fourth exception to the American rule on fee awards. The fee is awarded in the nature of costs for vexatiously bringing or maintaining an unfounded action or defense. 6 J. Moore, Federal Practice ₱ 54 77[2] at 1079 (2d ed. 1974) (*id.*, 538 F.2d 53 at 57)

After considering the decision of this Court in *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 888 (1962), the *Skehan* Court held that:

> Since the obduracy ground for a fee award may still arise in this case, we hold that attorney's fees may be awarded as costs against a sovereign otherwise immune, if it pursues a bad faith, vexatious, wanton or oppressive course of litigation, but may not be awarded against an immune sovereign as damages because of pre-litigation obduracy on the authority of *Vaughan v. Atkinson*,
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> * * *
>
> We also instruct the district court to consider whether an award of attorney's fees would be appropriate against any of the individual defendants for bad faith, vexatious, wanton or oppressive conduct both prior to and during the course of this litigation, and against the college for such conduct subsequent to the commencement of the litigation. (*id.*, 538 F.2d 53 at 58-59, 63)

Thus, the dichotomy is clear. An individual state official can render himself personally liable for "pre-litigation obduracy"

> . . . under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the . . . [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. [Wood v. Strickland] 420 U.S. at 322, 95 S.Ct. at 1001. (Cited in *Skehan, supra*, 538 F.2d 53 at p. 60).

Conversely, that individual official acting in bad faith cannot render a sovereign state liable for these prelitigation acts. This reasoning recognizes that it is the very commencement of litigation which, perforce, initiates the participation of the state's attorney general. Such

commencement requires both an evaluation and response respecting the legal posture of the state. Thus, an opportunity is thereby afforded to the state to correct erroneous or oppressive administrative acts by individual officials. If any "bad faith, vexatious, wanton or oppressive course of litigation" were *then* pursued, an award of compensatory attorney's fees would be mandated. Correspondingly, the bad faith acts of individual officials prior to litigation would not render sovereign states liable as being "acts in their official capacities." Instead, such awards of attorney's fees for "pre-litigation obduracy" would be recognized as really being impositions of punitive damages against state funds. Thus, the decision of this Court in *Edelman v. Jordan, supra*, would continue as the benchmark absent congressional acts to the contrary.

CONCLUSION

Your *Amicus* therefore respectfully urges that the Eleventh Amendment be held to bar an award of attorneys' fees against treasuries of the respective States in the absence of appropriate statutory authorization.

Respectfully submitted,

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